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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

MAXWELL D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In this case, the Sixth Circuit granted habeas relief based on the habeas petitioner's claim that the state trial court had violated the Constitution by failing to dismiss a potential juror who was impermissibly biased in favor of the death penalty. The question presented is:

> Whether AEDPA prevents a federal court from substituting its own judgment on whether a juror was biased for that of the state trial court's, where the state trial court had the opportunity to evaluate the juror in person, and the transcript provides at least a plausible basis supporting the state trial court's determination that the juror was not biased.

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary, where Ohio's death-sentenced prisoners are held. (Betty Mitchell, Respondent-Appellee below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held).

The Respondent is Maxwell D. White, Jr., an inmate who had been housed at the Ohio State Penitentiary on death row. (Since the decision below, White was transferred from death row to the Mansfield Correctional Institution, but he will be returned to the Ohio State Penitentiary if his death sentence is reinstated.)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 4

A. Maxwell White shot and killed Ohio State Trooper James Gross during a traffic stop. 4

B. A state court jury convicted White and recommended the death sentence, which the trial judge imposed. 5

C. White litigated his juror-bias claim on the merits in state court in his direct appeal. 8

D. The federal district court rejected White's juror-bias claim 9

Page

E. The Sixth Circuit reversed the district court and vacated White's sentence 9

REASONS FOR GRANTING THE WRIT 11

A. Settled precedent mandates "special deference" for state court determinations regarding juror bias. 11

B. The decision here conflicts with settled law in failing to defer as AEDPA directs to the state court determination regarding juror bias 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 19, 21, 22

Brown v. Lambert,
2006 U.S. App. Lexis 14933
(9th Cir. June 19, 2006) 16, 17

Dennis v. United States,
339 U.S. 162 (1950) 13

Dyer v. Calderon,
122 F.3d 720 (9th Cir. 1997) 14

Gall v. Parker,
231 F.3d 265 (6th Cir. 2000) 18

Gonzales v. Thomas,
99 F.3d 978 (10th Cir. 1996) 14

Marshall v. Lonberger,
459 U.S. 422 (1983) 11, 12

Martini v. Hendricks,
348 F.3d 360 (3d Cir. 2003) ..... *passim*

Morgan v. Illinois,
504 U.S. 719 (1992) 21

McDonough Power Equip. v. Greenwood,
464 U.S. 548 (1984) 19

Patton v. Yount,
467 U.S. 1025 (1984) 12

Page(s)

Reynolds v. United States,
98 U.S. 145 (1879) 12

Rice v. Collins,
126 S. Ct. 969 (2006) ..... *passim*

Rushen v. Spain,
464 U.S. 114 (1983) 12, 22

Sallahdin v. Gibson,
275 F.3d 1211 (10th Cir. 2002) 14

Stevens v. Horn,
2006 U.S. App. Lexis 17043
(3d. Cir. July 6, 2006) 18

Sumner v. Mata,
449 U.S. 539 (1981) 11

Townsend v. Sain,
372 U.S. 293 (1963) 11

Wainwright v. Witt,
469 U.S. 412 (1985) 12, 13, 21

Williams v. Bagley,
380 F.3d 932 (6th Cir. 2004) 14, 15, 22

Witherspoon v. Illinois,
391 U.S. 510 (1968) 15

Wolfe v. Brigano,
232 F.3d 499 (6th Cir. 2000) 18

Page(s)

United States v. Elias,
269 F.3d 1003 (9th Cir. 2001) 20

United States v. Tucker,
243 F.3d 499 (8th Cir. 2001) 19, 20

United States v. Viezca,
265 F.3d 593 (7th Cir. 2001) 20

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... *passim*

Ohio Rev. Code § 2929.04 5

PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Warden of the Mansfield (Ohio) Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's Opinion, *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005), is reproduced at App. 1a–43a. The Sixth Circuit's denial of rehearing en banc is reproduced at App. 44a. The United States District Court for the Northern District of Ohio's Memorandum of Opinion and Order is reproduced at App. 45a–176a. The Ohio Supreme Court's opinion on direct appeal, *State v. White*, 693 N.E.2d 772 (Ohio 1998), is reproduced at App. 177a–199a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals issued its opinion on December 7, 2005. The Sixth Circuit denied the Warden's petition for rehearing with a suggestion for rehearing en banc on April 21, 2006. The Warden timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

* * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

* * *

INTRODUCTION

In a decision that rewrites AEDPA's standards for reviewing juror-bias claims, the Sixth Circuit relied on such a claim to vacate a convicted cop-killer's capital sentence. While the court below recited AEDPA's requirements of deference, it never applied them, resulting in a decision that conflicts with both AEDPA's commands and this Court's precedents regarding how juror-bias claims are evaluated in habeas. Even before AEDPA, this Court had established that state trial court determinations as to juror bias are entitled to special deference, as only the trial court judge is in the position to observe the juror's demeanor. And, if anything, AEDPA has strengthened that deference. Federal habeas courts must accept state court factual findings, such as a finding as to whether a juror is biased, unless the finding is "objectively unreasonable," a standard of review that the

Court has implied is even more deferential than "clear error." *Rice v. Collins*, 126 S. Ct. 969, 974 (2006).

Here, the voir dire transcript would not even support a finding that the state trial judge was "clearly erroneous" in finding the juror to be unbiased, let alone that the judge was objectively unreasonable. During the voir dire, the juror at issue initially voiced some hesitations about her ability to be fair, concerns that any responsible juror might well have when she learns that a case involves the slaying of a police officer and the possibility of the death penalty. But the juror also unequivocally affirmed that she would obey the law and the court's instructions, that she would not allow her personal opinions to override those instructions. She explained that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed I this particular case," and that she would listen to those factors "with an open mind, unbiased by what [she] feels like [she] might want to do."

The trial court believed the juror's statements. Its decision to accept these sworn statements—statements that the transcript on its face shows that the juror made in good faith—simply cannot rise to the level of "objective unreasonableness" that AEDPA requires before a federal habeas court can ignore state-court credibility determinations. Indeed, permitting the lower court's decision to stand here would allow an unprecedented level of federal court intrusion into state court criminal convictions. In fact, the lower court's analysis on this issue is so deeply flawed, and so sharply contrary to both the statutory language and this Court's mandates, that Ohio respectfully suggests that summary reversal may be warranted. In the alternative, Ohio urges the Court to accept review to prevent this flawed understanding of "unreasonableness" from further permeating habeas jurisprudence.

STATEMENT OF THE CASE

A. Maxwell White shot and killed Ohio State Trooper James Gross during a traffic stop.

In the early morning hours of January 19, 1996, Maxwell White shot and killed Ohio State Trooper James Gross during a routine traffic stop on Interstate 71 in Ohio. Petition Appendix ("App.") 3a.

At the time of the stop, unbeknownst to Gross, White was in an agitated and violent state. White was fleeing his mother's condominium after an altercation with her and his sister. After an argument with his mother, White had tied them up, and then accidentally shot his mother in the foot. He then fled in his car, heading for the interstate. App. 2a.

Trooper Gross was stationed along the highway that evening, and received reports from other drivers that a brown car was driving erratically. He left his outpost and, within minutes, spotted White's brown car. When he called in the license number, he learned that the car was registered to White. He also learned that White did not have driving privileges due to a prior drunk driving conviction. So Trooper Gross pulled White over. App. 3a.

According to passing motorists who later testified at White's trial, Gross walked up to White's car and leaned down to speak with him. At that point, the witnesses testified that they heard a pop and saw a flame. Trooper Gross spun around and fell as he attempted to run back to his vehicle. The witnesses then saw White lean out of the car and fire more shots at the trooper's back. App. 3a.

White fled in his vehicle, and he was caught after a high-speed chase. The gun was found in White's car. Trooper Gross died of bullet to his heart, which had entered Gross' back, just beneath his bullet-proof vest. App. 3a.

B. A state court jury convicted White and recommended the death sentence, which the trial judge imposed.

An Ashland County grand jury indicted White for aggravated murder. The indictment specified two aggravating circumstances, either of which made White eligible for the death penalty: (1) White's victim was a peace officer; and (2) White killed to escape apprehension for a crime. See Ohio Rev. Code §§ 2929.04(A)(3) & 2929.04(A)(6). The indictment further charged White with possession of a weapon while under disability and abduction of his mother. App. 3a–4a.

White invoked his right to a jury trial. Because the indictment included a capital charge, it was necessary to "death qualify" the jury members during voir dire. That is, in selecting the jury before trial, in addition to the typical voir dire, the prosecutor and defense counsel conducted a separate voir dire directed at matters relating to the death penalty.

It was Suzanne Sheppard's answers during that portion of the voir dire that the court below relied on in vacating White's sentence. See App. 31a–43a. (The entirety of Sheppard's penalty phase voir dire is located at App. 200a–13a.) A review of that transcript indeed reflects that Sheppard voiced certain concerns about her participation on the jury. Not surprisingly, given what she had heard in the earlier portion of the voir dire about the heinous nature of the crime, she questioned her ability to be completely open-minded about the penalty if, in fact, the prosecutor proved White shot the officer. For example when she was initially asked whether she "would be able to follow the Court's instructions [about the death penalty]," she responded "I have mixed emotions on that because I feel—I am for the death penalty." App. 203a. She then went on to say that "to be honest, I don't think I would be fair to the Defendant." App. 203a. And further elaborating on that, she stated that:

> **Sheppard**: I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it's strong enough doubt. I just want you to be aware of it.

App. 204a. Similarly, in response to questions from the defense counsel, she indicated that she had "feelings" that she might not be able to be fair to the defendant. App. 210a. And, when asked whether she believed she should serve on the jury, she indicated that she probably should not. App. 210a.

Even in voicing these doubts, however, Sheppard also made it clear that she was not saying that she would automatically vote for death. Rather, she was only in favor of it if "it's proven that it should be given":

> **Prosecutor:** When you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?
>
> **Sheppard:** Yes. I guess I am trying to say I am in favor of it as long as it's proven that it should be given.

App. 205a.

Even more importantly, Sheppard completed her examination by offering a number of unequivocal assertions regarding her participation as a juror. First, she testified that she "would obey the law and the [c]ourt's instructions [regarding the death penalty]." App. 212a. Second, when asked if her personal feelings would override those instructions, she unequivocally stated they would not: "I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life." App. 213a. Third, she testified that she would undertake the required balancing

of aggravating factors against mitigating factors before reaching her decision:

> **Defense Counsel:** Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror?
>
> **Sheppard:** Right.

App. 213a. Perhaps most importantly, she expressly affirmed that she would listen to those factors with an open mind:

> **Defense Counsel:** You would listen to those [factors] with an open mind, unbiased by what you feel like you might want to do?
>
> **Sheppard:** Yes.

App. 213a.[1] Based on this testimony, the court overruled the defendant's motion to remove her for cause, and seated her on the jury. App. 213a.

After hearing all of the evidence, the jury found White guilty of aggravated murder.

During the penalty phase, White offered a variety of mitigating evidence, including testimony from family members and co-workers that White had difficulty in school despite above-average intelligence, had trouble with authority figures, was discharged from the Navy, and had battled alcoholism. A psychologist testified that White was dependent on alcohol and marijuana, suffered from depression, lived with a dysfunctional family, and had an abusive father. Finally, White offered a statement apologizing to Trooper Gross's family, accepting responsibility, and asking the jury to spare his life. After

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[1] On page 213a of the Appendix, this question was erroneously transcribed twice. In fact, it was asked once and Sheppard responded "Yes."

hearing his presentation, the jury unanimously recommended a capital sentence. The judge concurred in their recommendation, and imposed a death sentence.

C. White litigated his juror-bias claim on the merits in state court in his direct appeal.

The Ohio Supreme Court affirmed White's conviction and sentence on direct appeal. White raised his juror-bias claim regarding Sheppard as his first proposition of law. The Ohio Supreme canvassed its case law as well as this Court's opinions on the subject and determined that the trial judge did not abuse his discretion in finding that Sheppard was not biased. The Ohio Supreme Court focused on the trial judge's unique position to sort through conflicting responses regarding a juror's thoughts on the difficult issue of imposing the death sentence:

> [W]e recognized that during voir dire in death penalty cases, prospective jurors often struggle with their personal beliefs concerning the death penalty. In these situations, it is the role of the trial judge to sort through the responses of prospective jurors to determine whether these individuals can follow the law.
>
> In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs,

> we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause.

App. 183a–84a.

D. The federal district court rejected White's juror-bias claim.

After pursuing state post-conviction remedies for other claims, White filed a federal habeas petition advancing twenty-one grounds for relief. This included the juror-bias claim directed at Sheppard, which White used both to attack his conviction and to attack his capital sentence. The district court rejected White's petition. App. 45a. In doing so, the court noted that Sheppard's answers during voir dire were at times ambiguous and contradictory regarding her ability to follow the law in determining the proper sentence. App. 77a–78a. But the district court found itself bound by this Court's consistent instruction that trial judges are uniquely positioned to make the credibility judgment inherent in resolving juror-bias questions in the face of ambiguous and contradictory testimony. App. 78a. The district court found both that there was sufficient evidence from which the trial judge could find no bias and that the Ohio Supreme Court reasonably applied clearly established federal law in upholding the trial judge's decision. App. 79a.

E. The Sixth Circuit reversed the district court and vacated White's sentence.

White appealed on a variety of grounds, including renewing his juror-bias claim as a challenge both to his conviction and his sentence. The Sixth Circuit affirmed the district court with regard to White's conviction, but reversed the trial court decision and granted White habeas relief as to his death sentence. The court based this relief solely on its determination that Juror Sheppard was impermissibly biased in favor of the death penalty.

In rejecting White's juror-bias challenge to his *conviction*, the panel engaged in typical habeas appellate review. It closely considered the state court findings, as well as the district court's determinations. See App. 33a–35a. Based on these, it concluded that "[e]specially in light of the special deference owed to a trial judge's determination of juror impartiality as well as the deferential standard for reviewing factual findings under § 2254, we cannot say that the Ohio Supreme Court's ruling on this issue was unreasonable." App. 35a.

With regard to White's juror-bias challenge to his *sentence*, however, the court took a different tack. With only a passing nod to the state trial court's determination and the Ohio Supreme Court's findings on the juror-bias issue, the panel appeared to independently assess the meaning of juror Sheppard's answers. Based on its own independent review of the transcript, the panel concluded that "[d]espite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony." App. 42a. The panel then added an AEDPA gloss to its otherwise essentially de novo treatment of the juror-bias issue: "Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent." App. 42a.

Because the opinion on this issue creates important conflicts both with this Court's precedent, and with law from the other circuits, regarding the appropriate scope of federal court review of state criminal convictions under AEDPA, the Warden now respectfully requests review.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the Court's precedent, AEDPA's plain language, and other federal circuits' views regarding the proper framework for assessing juror-bias claims in habeas. The Court has consistently reminded the lower courts that, because state trial courts are uniquely positioned to assess juror credibility, federal courts may not substitute their judgment for that of the state court on juror-bias issues so long as the record provides at least some plausible support for the state court's conclusion. Although the court below here talked of deference, its decision eschewed the Court's guidance on what such deference means. In the face of a juror's unequivocal assertions that she would follow the court's instructions and that she could and would listen to the evidence with an open mind, the federal court nonetheless rejected the state court's decision that the juror was suitable. That approach simply cannot be squared with the Court's decisions or the previous treatment of such claims in the federal appellate courts, and it will result in unwarranted federal intrusion into state criminal adjudications.

A. Settled precedent mandates "special deference" for state court determinations regarding juror bias.

1. Beginning with *Townsend v. Sain*, 372 U.S. 293 (1963), and proceeding through cases like *Sumner v. Mata*, 449 U.S. 539, 547 (1981), and *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983), this Court has consistently held that federal habeas courts must presume that state court findings of fact are correct. And the Court has also clearly explained what this presumption entails—the presumption "requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." *Id.* at 432 (punctuation omitted). The Court has also emphasized that the

presumption is particularly strong when the state findings involve credibility determinations, as the habeas corpus statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Id.* at 434; see also *Rice v. Collins*, 126 S. Ct. 969, 976 (2006) (habeas petitioner must "demonstrate[] that a reasonable fact finder *must conclude*" the opposite of the trial court's conclusion) (emphasis added).

The Court has repeated this lesson in the context of juror-bias determinations, confirming that a trial judge's bias finding is "plainly one of historical fact" and thus entitled to a presumption of correctness. *Patton v. Yount*, 467 U.S. 1025, 1036, 1038 (1984); see also *Wainwright v. Witt*, 469 U.S. 412, 428 (1985). In fact, such findings are entitled to even greater deference because of the unique credibility determination involved in assessing juror bias. *Patton*, 467 U.S. at 1038 (trial judge's juror-bias determination entitled to "special deference" even on direct appeal); *Rushen v. Spain*, 464 U.S. 114, 121 & n.6 (1983). Indeed, as far back as 1878, the Court noted the severe problems appellate courts face in second-guessing juror-bias determinations:

> [J]urors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger.

Reynolds v. United States, 98 U.S. 145, 156–57 (1879). Moreover, this Court has given specific weight to a juror's statement that he or she can be impartial. See *Dennis v. United States*, 339 U.S. 162, 171 (1950) ("One may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter."). Ultimately, on questions of juror bias, "[t]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Witt*, 469 U.S. at 434.

Congress sought to elevate the level of deference to state-court fact finding when it passed AEDPA in 1996. For post-AEDPA cases, federal courts may not grant the writ unless the state court's factual finding is an "unreasonable determination of facts in light of the evidence presented" during the state court proceedings. 28 U.S.C. § 2254(d)(2). Moreover, "a determination of a factual issue made by a State court shall be presumed to be correct," and a habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

And just this year, the Court confirmed that the level of deference for challenges under AEDPA to juror-bias determinations is high indeed. In *Rice*, a habeas case in which the petitioner had challenged (on *Batson* grounds) a state trial court's decision to exclude a juror, the Court indicated that the AEDPA standards for reviewing state court factual determinations regarding juror bias are at least as deferential as the clear-error analysis the same determinations would receive on direct appeal. 126 S. Ct. at 974 ("On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. Under AEDPA, however, a federal habeas court must find the state-

court conclusion an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. . . . State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by clear and convincing evidence.") (citations and punctuation omitted). In short, federal courts are not free to substitute their judgment for that of the state trial court.

2. Until the decision below, decisions from the circuits reflected the Court's clear mandates on this issue. Both before and after AEDPA, in cases where a juror's responses lend support in both directions on bias issues (i.e., some testimony supporting a finding of bias, and some suggesting a lack of bias), federal habeas courts have deferred to the state courts' determination. See, e.g., *Dyer v. Calderon*, 122 F.3d 720, 730 (9th Cir. 1997) (applying pre-AEDPA law); *Gonzales v. Thomas*, 99 F.3d 978, 985 (10th Cir. 1996) (same); *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003) (applying AEDPA); *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004) (same); *Sallahdin v. Gibson*, 275 F.3d 1211, 1224 (10th Cir. 2002) (same).

For example, in *Williams*, an earlier Sixth Circuit panel properly deferred to the state trial court's determination that it was unnecessary to exclude two jurors whose voir dire indicated support for the death penalty. The court noted that one of the jurors had given conflicting responses during voir dire. See *Williams*, 380 F.3d at 953; see also *id.* at 954–57 (recounting voir dire testimony, including juror statement that "[i]f there was any remote chance of them being paroled, I would probably go with the death penalty"). But "in response to specific questioning by the trial court and defense counsel, she stated that she could follow the court's instructions and recommend a sentence of life imprisonment with parole eligibility if the aggravating circumstances did not outweigh the mitigating factors." *Id.* at 953–54. That statement, in the face of conflicting responses throughout the

remainder of the voir dire, was enough to mandate deference to the trial court's ultimate conclusion not to exclude the juror. See also *id.* at 960–61 (applying similar reasoning to affirm the trial court's decision on the second challenged juror).

Similarly, in *Martini*, the Third Circuit deferred to the state trial court's decision to exclude a juror where the record reflected juror testimony going both ways. The state trial court had concluded that the juror was opposed to the death penalty to such an extent that it interfered with his ability to follow the law in the case. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968). As the Third Circuit summarized in reviewing a challenge to that decision on habeas, the juror had offered conflicting testimony on that issue:

> Vladyka's responses to certain questions surely create considerable doubt as to whether he could separate his personal beliefs (his opposition to the death penalty) from the task at hand. . . . On the other hand, when asked: 'Would you be able to vote to impose the death penalty?' Vladyka answered, 'Yes, sir.' He also confirmed in at least six other places, with various degrees of conviction, that he would be able to engage in the weighing process and would be able to vote for death if the facts warranted.

Id. at 366. Thus, the court concluded, "[t]he inevitable question is how to interpret the 'I think so's' and the 'I guess so's,' which constitute the bulk of Vladyka's affirmative responses to the effect that he could vote to impose the death penalty." *Id.* at 366–67.

In light of a record containing plausible support for a finding in either direction on the bias issue, the Third Circuit properly left the final determination to the trial court. That is, the court specifically noted that the record provided a sufficient basis for the habeas petitioner to make a "plausible

argument" that the state trial court had erred in excluding the juror. "But," the court went on, "we are constrained by our standard of review. We cannot say by clear and convincing evidence that the state trial judge, who saw Vladyka and doubtless 'sized him up,' was incorrect in his finding." *Id.* at 368.

What these courts uniformly recognize is that where the record could plausibly support a holding in either direction, it is the state trial court, not the federal habeas court, that gets to make the final call.

3. Even habeas courts that do find reversible error in juror-bias determinations are careful to point out that they did so only because the record contained no plausible support for the trial court's determinations.

In *Brown v. Lambert*, 2006 U.S. App. Lexis 14933 (9th Cir. June 19, 2006), for example, the Ninth Circuit granted a writ of habeas corpus based on a petitioner's claim that the state trial court had improperly excluded three jurors who the trial court determined had an anti-death penalty bias.

The court agreed with the habeas petitioner as to one of the three jurors. But, in reaching that result, the court specifically noted that "no degree of deference" would support the trial court's finding, as "nothing whatsoever" in the third juror's voir dire testimony would support the state trial court's conclusion that the juror was so opposed to the death penalty that he could not follow the law:

> The undisputable fact is there is *nothing whatsoever* in juror Z's voir dire that lends *the least support* for the finding—explicit or implicit—that he would not follow his oath. This is a juror who listed himself as pro-death penalty in his juror questionnaire and stated repeatedly under oath that he believes in the death penalty. He did not perhaps show the kind of bloodthirsty

> eagerness for its imposition that the prosecutor may have preferred—juror Z did say he "would have to give [the matter] some thought" and reserved the right to impose the death penalty only when he "was convinced [it] was the appropriate measure"—but there is *nothing in his testimony* that could *remotely support* the view that he would not faithfully follow the court's instructions. No degree of deference, nor allowance for facial expressions and demeanor, can possibly fill in what isn't there: *the least indication* that juror Z could not or would not follow the law.

Id. at *17 n.10 (emphases added). Thus, it was the absence of *any* support in the record that doomed the state trial court's determination, not merely a disagreement as to which part of the juror's statements should be credited.[2] And even under this very deferential analysis, the Ninth Circuit panel's decision drew five votes in favor of rehearing en banc from judges who thought the panel should have afforded even greater deference under AEDPA to the state court's factual findings. See *id.* at *20 (Tallman, J., dissenting from denial of rehearing).

Moreover, again confirming the principle that any plausible support in the record is enough to uphold the state trial court's determination, the Ninth Circuit rejected the

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[2] The Ninth Circuit also noted that the trial court ultimately had never made a finding on the proper *Witherspoon* question for juror Z, and thus there was no factual finding to which to defer. Rather than finding that juror Z would be unable to follow instructions, the state court instead found simply that juror Z's statement that he would impose the death penalty where the defendant "would reviolate if released" was an incorrect statement of the law, and thus proper grounds for a for-cause exclusion. This is an improper analysis under *Witherspoon*, and thus, as the Ninth Circuit held, was "directly contrary to Supreme Court precedent," *Id.* at * [illegible] (citing 28 U.S.C. 2254(d)(1)).

petitioner's claims as to the two other jurors. As to them, it found that at least a few lines in the record indicated a possible unwillingness on those jurors' part to follow the law, thereby triggering deference to the state court's decision to exclude them.

Similarly, in other cases, where federal courts have reversed state-court determinations regarding juror bias it is because the record lacks *any* support for the state trial court's bias determination. See *Stevens v. Horn*, 2006 U.S. App. Lexis 17043, at *23–24 (3d. Cir. July 6, 2006) ("In the absence of *any* evidence in the record to support the state courts' finding, it must be true that Stevens has established, by the requisite clear and convincing evidence, that Hartling was [improperly] removed for cause on a 'broader basis than inability to follow the law or abide by [her] oath [as a juror].'"); *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) (reversing failure to exclude two jurors when "[n]either of these jurors stated unequivocally that they could set aside their relationships with the victim's parents and decide the case fairly;" reversing failure to exclude two additional jurors "[i]n the absence of an affirmative and believable statement that these jurors could set aside their opinions and decide the case on the evidence and in accordance with the law"); *Gall v. Parker*, 231 F.3d 265, 331 (6th Cir. 2000) (reversing, under *Witherspoon*, the exclusion of a juror who "not once stated that his beliefs would deter him from serving as an impartial juror").

Requiring such deference only makes sense. Voir dire, transcripts, after all, will often suffer from some internal conflict. Jurors are typically lay people, meaning that legal jargon may leave them confused. The voir dire may be their first interaction with the judicial system, causing stress or leading the potential jurors to "over-think" their responses. And, as was the case here, lawyers often add to the confusion, posing long questions in garbled syntax. See App. 206a. (court responding to juror's confusion about question

by noting that "I think you [defense counsel] need to rephrase that. I have difficulty with the question too."). In light of that reality, a rule that would permit federal courts to disregard a state trial court's judgment on a juror-bias issue, so long as the federal court could find some portion of the voir dire transcript that casts doubt on the decision, would be an open invitation for federal courts to micromanage the state criminal jury selection process. That is hardly the result Congress intended in AEDPA.

4. Indeed, even outside the habeas context, when federal appellate courts directly review federal trial court determinations on issues of juror bias, they do so under a clear-error standard of review. The Eight Circuit, in *United States v. Tucker*, 243 F.3d 499 (8th Cir. 2001), treated *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), as its "pole star" for reviewing the trial court's findings in a concealed-juror-bias claim under *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984):

> Under *Anderson*, review for clear error requires not just deference to the fact finder's views, but a very specific level of deference:
>
> > If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.
>
> *Id.* [*Anderson*] at 573–74. We may reject the fact finder's choice between conflicting evidence only where there is something wrong with the choice.

> See *id.* at 574–75. Furthermore, when findings are based on determinations regarding the credibility of witnesses, the level of deference is even higher than the standard already described. *Id.* at 575. "When a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Id.*

Tucker, 243 F.3d at 506 (quoting and citing *Anderson*). See also *United States v. Elias*, 269 F.3d 1003, 1021 (9th Cir. 2001) (upholding trial court's juror-bias determination after clear-error review); *United States v. Viezca*, 265 F.3d 593, 601 (7th Cir. 2001) (same). And, as noted above, the standard under AEDPA is, if anything, even *more deferential* than the clear-error standard on direct review. See *Rice*, 126 S. Ct. at 974.

Taken together, these cases uniformly confirm the straightforward proposition that, so long as the record provides at least plausible support for the state trial court's juror-bias determination, federal habeas courts may not second-guess state trial judges. As more fully described below, however, the decision below squarely conflicts with this settled jurisprudence, and threatens to dramatically alter the fundamental nature of AEDPA review of juror-bias claims.

B. The decision here conflicts with settled law in failing to defer as AEDPA directs to the state court determination regarding juror bias.

In this case, the court below spoke of providing deference, but a review of its actual judgment confirms that the definition of "deference" the court employed is vastly different from the one this Court, and AEDPA's plain

language, mandate. Even a quick review of the voir dire transcript confirms that the state trial court's determination that Juror Sheppard was unbiased is, at the least, "fairly supported by the record," *Witt*, 469 U.S. at 433, and one of "two permissible views of the evidence," *Anderson*, 470 U.S. at 574. Despite Sheppard's statements that she favored the death penalty and her stated concerns about participating on the jury, in the end she repeatedly and unequivocally affirmed that she would indeed set aside her personal beliefs, consider the evidence, and follow the court's instructions on the law. See above at 6–7. The state trial court elected to credit those statements. The federal court's decision to second-guess that determination upsets settled understandings of "deference," creating an untenable conflict in habeas jurisprudence.

1. Under *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), a juror cannot serve in a capital case if she cannot "in good faith [ ] consider the evidence of aggravating and mitigating circumstances as the instructions require." To find "fair support in the record" for the trial court's determination that Juror Sheppard passes muster under *Morgan*, one need only look to her responses to both the prosecutor and the defense counsel near the end of her voir dire. There she affirms:

- that she will "obey the law and the [c]ourt's instructions," App. 212a;
- that she will not allow her personal feelings to override the judges instructions, App. 213a;
- that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case," App. 213a; and
- that she "would listen to [that evidence] with an open mind, unbiased by what [she] feel[s] like [she] might want to do," App. 213a.

To be sure, the transcript also contains passages that *could be* used to support a finding of bias. But the same could have been said about the conflicting voir dire testimony in cases such *Williams* and *Martini*. See *Williams*, 380 F.3d at 955 (affirming trial court that allowed juror despite pro-death penalty statements including "[i]f there was any remote chance of them being paroled, I would probably go with the death penalty"); *Martini*, 348 F.3d at 366 (affirming trial court that excused juror despite at least six statements indicating willingness to impose death despite the juror's scruples). There the courts saw the conflicting testimony as requiring the federal court to accept the state court's determination, while here the court used it as a basis for overturning the state court's decision.

By doing so, the court below abandoned settled understandings of "deference," in favor of some broader power to oversee juror-bias determinations. Even though it repeatedly acknowledged the "deference usually owed to trial judges" in this situation, the court ultimately substituted its own credibility determination for the trial court's. Instead of searching for support in the record to affirm the trial court's determination, the Sixth Circuit focused on its *own* "grave" and "weighty" concerns about Sheppard's voir dire testimony. App. 41a, 42a. Ultimately, the Sixth Circuit concluded that "Sheppard was simply unbelievable as an impartial juror." App. 42a. But as established above, reversing a trial court's credibility determination is not the province of a federal habeas court, unless the determination "lack[s] even fair support in the record" *Rushen*, 464 U.S. at 121 n.6 (brackets omitted), or unless the determination is not one of two "permissible views of the evidence," *Anderson*, 470 U.S. at 574. Sheppard's repeated, express statements of impartiality establish that the trial court's determination was a permissible one, and the Sixth Circuit overstepped its role when it concluded otherwise.

The court's emphasis on particular statements in Sheppard's voir dire highlights the problems with its analytical approach. The court read a certain passage from the voir dire—where Sheppard said she would "like to be a part of that," App. 212a—as suggesting that Sheppard was "eager[] to impose the death penalty in this particular case," App. 35a, or that she "relished taking part in the imposition of the death penalty in this particular case." App. 41a. But that passage could just as easily be read to suggest something entirely different. Reading the passage as a whole, Sheppard seems to be saying that she had initially hoped to avoid serving on the jury, but that she had come to recognize during the voir dire that it was a civic duty, and not one that she should abandon lightly. See App. 212a (Sheppard notes that "[w]hen I walked in here today, it was—I thought it would be an easy out just to say I think he's guilty and that's it," but now believes she has "a duty" to "find the real truth" and be part of the judicial process). The point of the Court's jurisprudence on juror-bias issues is that it is the state trial court, not the federal habeas court, that should be selecting between competing interpretations. The lower court's willingness to simply substitute its own judgment for the state court's creates a direct conflict with that jurisprudence.

In the final analysis, this case is nearly identical to the situation presented in *Rice*. There, the Ninth Circuit had overturned a state court finding that the prosecutor had offered a credible race-neutral reason for exercising a peremptory challenge. This Court unanimously reversed, finding that the Ninth Circuit substituted its own view of the record on the credibility issue for that of the trial judge's.

Here, just as in *Rice*, the circuit court relied on, at best, a "set of debatable inferences" from the record below to support its conclusion on the credibility issue. 126 S. Ct. at 976. And, just as in *Rice*, while the court below may have shown that reasonable minds *could* have gone the other way

on the bias question, that "does not suffice to supersede the trial court's credibility determination." *Id.*

In short, to obtain relief, as the Court noted in *Rice*, the habeas petitioner must show that "a reasonable factfinder *must conclude*" that the state court determination was wrong. *id.* at 975 (emphasis added). While the record here might *allow* a conclusion of bias, it certainly does not *compel* that conclusion, and thus, just as in *Rice*, a federal court cannot step in and "supersede" the state court's credibility determination. *Id.*

Finally, Ohio stresses that the decision below is not merely an erroneous application of settled law to the facts of this case. Rather, the decision reflects an entirely new understanding of deference, one that allows a federal court to ignore a state court's holding, even where that holding has fair support in the record. Of course, in the context of habeas, rules regarding deference are a vital component of protecting the States' sovereign right to control their criminal adjudication processes. Thus, the decision here, if allowed to stand, will have impact far beyond the boundaries of this case.

The understanding of deference reflected in the decision below so clearly conflicts with the Court's precedent that Ohio respectfully suggests that summary reversal may be appropriate. At the very least, the lower court's adoption of an unprecedented and unwarranted framework for assessing juror-bias claims calls for immediate review and correction.

CONCLUSION

For all of the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

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July 20, 2006

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No. _____

Supreme Court, U.S.
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OFFICE OF THE CLERK

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

MAXWELL D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, 431 F.3d 517, December 7, 2005 ..... 1a

Appendix B: Order Denying Rehearing En Banc, United States Court of Appeals for the Sixth Circuit, April 21, 2006 ..... 44a

Appendix C: Memorandum of Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, December 21, 2001 ..... 45a

Appendix D: Opinion, Supreme Court of Ohio, 693 N.E.2d 772, May 20, 1998 ..... 177a

Appendix E: Trial Transcript of Voir Dire Proceedings, June 10, 1996 ..... 200a

APPENDIX A

Maxwell D. White, Jr., Petitioner-Appellant,
v.
Betty Mitchell, Warden, Respondent-Appellee.

No. 02-3073

United States Court Of Appeals For The Sixth Circuit

431 F.3d 517

December 7, 2005, Decided

JULIA SMITH GIBBONS, Circuit Judge. In 1996, an Ohio state jury convicted Maxwell D. White, Jr. of aggravated murder with two death penalty specifications, having a weapon while under a disability and abduction. White was sentenced to death. White sought a writ of habeas corpus in federal district court. The district court denied the petition in its entirety. The district court granted a certificate of appealability on two claims: (1) whether one of the seated jurors lacked sufficient impartiality to serve on the jury; and (2) whether prosecutorial theatrics denied White a fundamentally fair trial. A panel of this court granted a certificate of appealability on the following additional issues: (3) whether the prosecution improperly used its peremptory challenges to exclude women from the jury; (4) whether White received ineffective assistance of counsel during the mitigation phase of trial; (5) whether pretrial publicity resulted in undue prejudice; (6) whether the jury instructions violated White's due process rights; (7) whether the trial court improperly considered future dangerousness as an aggravating factor; (8) whether White's Fifth Amendment right against self-incrimination was violated by the introduction at trial of statements made by White during a

competency evaluation, and (9) whether White was entitled to discovery and an evidentiary hearing in district court. White appeals these issues.

For the following reasons, we affirm the district court's denial of White's petition with regard to all of the issues raised with regard to his conviction. However, because the state court's conclusion that one of the seated jurors, Susanne Sheppard, was believable as an impartial juror was contrary to or an unreasonable application of Supreme Court precedent, we reverse the decision of the district court and remand the case to the district court for purposes of granting a conditional writ of habeas corpus on the issue of juror impartiality as to the sentencing phase of the trial.

I.

At approximately 5:00 pm on January 18, 1996, White arrived at the condominium that he shared with his mother, Jean White, and told her that he was not going to his job at Kroger's warehouse. He left the condominium and did not return until approximately 12:00 am. When he returned, White was intoxicated and wanted to be left alone. He began screaming at his mother after she asked him to quiet down because she was concerned that someone might call the police due to the noise. White was afraid of a confrontation with the police because he was on probation for carrying a concealed weapon and believed that the police had harassed him on prior occasions. Upon learning that his mother had called his sister, White pulled the phones off the wall and told his mother not to call the police. White got a gun out of the gun cabinet and, when his sister arrived at the apartment, ordered his mother and sister at gunpoint to pack two bags for him with clothing and guns. White then tied his mother and sister to a pole in the basement. While White was struggling with a clip for a gun, the gun discharged in his hands and hit his mother in the foot.

White left the apartment, got in his car, and began speeding down Interstate 71. A few motorists reported a brown automobile traveling erratically on the highway in the early morning hours of January 19. Trooper James Gross received these reports and left the dispatching area in order to investigate. Within a few minutes of his search, Trooper Gross spotted the described automobile and pursued it. While following the automobile, Trooper Gross called in the car's license plate number and learned that the car was registered to White and that White did not have driving privileges due to a prior drunk driving conviction. Trooper Gross pulled White's vehicle over to the side of the road.

Several motorists traveling on Interstate 71 testified at trial that they saw Trooper Gross step out of his vehicle, walk toward White's vehicle, and lean toward the driver's side window to speak with White. The witnesses testified that they heard a pop and saw a flame, at which point Trooper Gross spun around and fell as he attempted to run back to his vehicle. The witnesses then saw White lean out of the car and fire shots at Trooper Gross's back. White then fled in his vehicle. A UPS driver and a deputy sheriff attempted to revive Trooper Gross, but he could not be revived. He died of a gun shot wound to his heart. The bullet had entered Gross's back, just beneath his bullet-proof vest.

Motorists who had witnessed the shooting began following White's vehicle. After a high-speed chase involving both truck drivers and the police, White was apprehended when he crashed his vehicle into an exit ramp. Police retrieved a semiautomatic pistol from the vehicle and took White into custody.

The Ashland County Grand Jury issued a three count indictment against White on January 25, 1996, charging him with (1) aggravated murder of Trooper Gross with a specification pursuant to Ohio Revised Code § 2929.04(A)(3) for acting with the purpose of escaping

detection, apprehension, trial or punishment for another offense and one specification pursuant to Ohio Revised Code § 2929.04(A)(6) for committing the murder against a peace officer whom White knew or had reasonable cause to know was engaged in his duties; (2) possession of weapons while under disability; and (3) abduction of Jean White with one specification for possessing a firearm on or about his person while committing the offense of abduction. White was arraigned on January 23, 1996. White entered a plea of not guilty by reason of insanity. The trial court conducted a competency hearing on April 22, 1996. Dr. James F. Sunbury. a psychologist, prepared a written psychological evaluation of White, in which Dr. Sunbury stated that White was, in Sunbury's opinion, competent to stand trial. The parties then stipulated to White's competency to stand trial. White did not pursue the insanity defense further.

White's trial began on June 10, 1996. The jury returned a verdict of guilty on all counts on June 19, 1996. The mitigation phase of trial began on June 24, 1996, and on June 29, 1996, the jury returned a recommendation of a death sentence for the aggravated murder charge. The trial court accepted the recommendation and sentenced White to death on July 10, 1996. The trial judge also sentenced White to eighteen months on the firearm charge and five to ten years on the abduction charge, to run consecutively to the death sentence.

White filed a notice of appeal on August 14, 1996. The Ohio Court of Appeals dismissed this appeal for want of jurisdiction on September 24, 1996. White filed an unsuccessful motion for reconsideration. White then appealed the decision to the Ohio Supreme Court. The Ohio Supreme Court affirmed White's conviction and death sentence on May 20, 1998. *State v. White*, 82 Ohio St. 3d 16, 1998 Ohio 363, 693 N.E.2d 772 (Ohio 1998). White unsuccessfully sought post-conviction relief. *State v. White*, 1998 Ohio App. LEXIS 4049, No. 97COA01229, 1998 WL

515944 (Ohio Ct. App. Aug. 7, 1998). White then filed a motion to reopen his direct appeal, but this motion was denied. *State v. White*, 89 Ohio St. 3d 1467, 732 N.E.2d 999 (Ohio 2000) (Table).

In November, 1999, White filed a petition for writ of habeas corpus in federal district court, setting forth twenty-one claims for relief. The district court denied White's petition in its entirety in an order dated December 18, 2001. The district court nonetheless granted a certificate of appealability on two claims: (1) whether Susanne Sheppard, one of the seated jurors, lacked sufficient impartiality to serve on the jury; and (2) whether prosecutorial theatrics denied White a fundamentally fair trial. A panel of this court granted a certificate of appealability on the following additional issues: (3) whether the prosecution improperly used its peremptory challenges to exclude women from the jury; (4) whether White received ineffective assistance of counsel during the mitigation phase of trial; (5) whether pretrial publicity resulted in undue prejudice; (6) whether the jury instructions violated White's due process rights; (7) whether the trial court improperly considered future dangerousness as an aggravating factor; (8) whether White's Fifth Amendment right against self-incrimination was violated by the introduction at trial of statements made by White during a competency evaluation; and (9) whether White was entitled to discovery and an evidentiary hearing in district court.

II.

White's petition is subject to the requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Under the AEDPA, a writ may not be granted unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent or "was based on an unreasonable determination of facts in

light of the evidence presented" during the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2). A state court decision is contrary to federal law when it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court decision constitutes an unreasonable application of Supreme Court precedent when it "identifies the correct governing legal principle from [Supreme Court] decisions but unreasonably applies that principle to the facts" of the case. *Id.* at 413.

We review the district court's legal conclusions *de novo* and its factual findings for clear error. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir. 2002). Where the district court makes no independent findings of fact, however, we review the factual findings *de novo*. *Bugh v. Mitchell*, 329 F.3d 496, 500 (6th Cir. 2003). Mixed questions of law and fact are reviewed under the "unreasonable application" prong of the AEDPA. *See Barnes v. Elo*, 339 F.3d 496, 501 (6th Cir. 2003). The state court's factual findings are entitled to a presumption of correctness and may be disturbed only upon a petitioner's showing by clear and convincing evidence that the factual findings were incorrect. *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

A.

White argues that prosecutorial misconduct denied him a fundamentally fair trial during both the guilt and the mitigation phases of trial. White objects to the following occurrences at trial: the display of a large photograph of Trooper Gross on an easel in the courtroom before the jury; the display of Trooper Gross's blood soaked uniform on the witness stand; and the prosecutor's use of latex gloves to

handle White's clothing.[1] White argues that all of these "prosecutorial theatrics" individually, as well as the cumulative effect of the errors, operated to deprive him of a fair trial. Because defense counsel failed to contemporaneously object to these occurrences, the Ohio Supreme Court found that the claims were waived absent plain error. Because the court found no plain error was present, it rejected the claim. *White*, 693 N.E.2d at 778. Finding that the Ohio Supreme Court's reasoning on this point was not contrary to Supreme Court precedent, the district court rejected the claim as well.

Although the district court did not address this issue, this claim is procedurally defaulted. It should be noted that Warden Mitchell did not raise procedural default of this claim before the district court, although she did raise the defense before this court on appeal. While procedural default is a defense that may be waived if not asserted; it is not a jurisdictional matter and, therefore, we are not obligated to raise the issue *sua sponte*. *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004). We are nonetheless permitted to consider the procedural default issue even when raised for the first time on appeal if we so choose. *Id.* In determining whether a claim is procedurally defaulted for the purpose of federal habeas review, the reviewing court must determine: (1) whether there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner did not comply with that rule; (2) whether the state court enforced the procedural sanction; (3) whether the state procedural rule

---

[1] White also objects to several of the prosecutor's statements before the jury during both the guilt and mitigation phases of trial in his appellate brief. However, the district court limited the grant of a certificate of appealability on the issue of "prosecutorial theatrics," which only includes the three instances stated above. As a result, we will not consider White's arguments premised on the prosecutor's statements.

is an independent and adequate state ground to foreclose review of the federal constitutional claim; and (4) whether the petitioner can establish cause for failing to follow the procedural rule and prejudice by the alleged constitutional error. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). We look to the last reasoned opinion of the state courts in determining whether the state courts enforced the procedural bar and presume that later courts enforced the bar rather than rejecting the claim on the merits. *Mason v. Mitchell*, 320 F.3d 604, 635 (6th Cir. 2003).

In this case, defense counsel failed to contemporaneously object to the prosecutor's alleged errors. In the last reasoned opinion of the state courts, the Ohio Supreme Court, as noted above, held that the claims were therefore waived absent plain error. *White*, 693 N.E.2d at 778-79. Although the Ohio Supreme Court did review the claims to ensure that there was no plain error, we have held that the plain error review by the state court does not constitute a waiver of procedural default rules. *Cooey v. Coyle*, 289 F.3d 882, 897 (6th Cir. 2002). We have also held that Ohio's contemporaneous objection rule is an independent and adequate ground to foreclose relief absent a showing of cause and prejudice. *Mason*, 320 F.3d at 635. White makes no attempt to show cause and prejudice that would excuse the procedural default. As a result, we deny relief with respect to this claim.

B.

White next argues that the prosecution impermissibly used its peremptory challenges to purposely exclude women from the jury and that he was denied a fundamentally fair trial as a result pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). White failed to present this claim to the Ohio state courts either on direct appeal or during post-conviction proceedings. White asserts that he raised the issue in an application to reopen his direct appeal pursuant to Ohio Supreme Court Rule XI(5) and *State*

v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (Ohio 1992). In the application, which is not included in the documents submitted to this court, White argued that appellate counsel was ineffective for failure to argue either the improper use of the prosecution's peremptory challenges or that trial counsel was ineffective in failing to challenge the prosecution's exercise of its peremptory challenges during voir dire. The Ohio Supreme Court summarily denied this motion. *White*, 732 N.E.2d at 999.

White next raised both the improper use of peremptory challenges as well as the ineffective assistance of appellate counsel claims in the district court on habeas review. The district court held that the *Batson* claim was procedurally defaulted because it had not been raised in any state court. However, the district court found that the ineffective assistance of counsel claim was raised properly for the first time in the *Murnahan* application and therefore considered and rejected the claim on the merits. We have granted a certificate of appealability only on the issue of whether the prosecution improperly used its peremptory challenges, not on whether appellate counsel was ineffective for failing to challenge the use of the peremptory challenges. Despite this fact, White's arguments on appeal to this court encompass both claims.

We must determine, at the outset, whether the petitioner has exhausted his claim in state court before we entertain the claim in a federal habeas petition.[2] *Prather v. Rees*, 822 F.2d 1418, 1420 (6th Cir. 1987). A federal court will ordinarily not review an issue in a habeas corpus petition unless the petitioner has first exhausted the claim before the state court, as the state court should normally have an opportunity to pass on the constitutional claim prior to federal habeas

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[2] The state incorrectly analyzes the *Batson* issue as procedurally defaulted, rather than unexhausted. The result, however, is the same.

review. 28 U.S.C. § 2254(b); *Duckworth v. Serrano*, 454 U.S. 1, 3, 102 S. Ct. 18, 70 L. Ed. 2d 1 (1981). A petitioner has exhausted his claim if he has presented the substance of the claim to the highest court in the state. *Prather*, 822 F.2d at 1420.

In this case, White failed to present the issue of whether the prosecution improperly excluded women from the jury under *Batson* before any state court. White did raise the issue of ineffective assistance of appellate counsel in his *Murnahan* application. While these two claims are related due to the fact that the ineffective assistance claim is based on the failure to raise a *Batson* challenge, the two claims are analytically distinct. Thus, White's *Murnahan* application based on the ineffective assistance claim cannot function to preserve the peremptory challenge argument. *See id.* at 1421 (where difference between two similar claims is difference in legal theory, exhaustion of one claim is not sufficient to find exhaustion of other claim).

As a result of White's failure to raise the *Batson* challenge, we decline to reach the merits of this claim. In so doing, we are mindful of the fact that the exhaustion requirement is not a jurisdictional one but rather is an issue of comity between federal and state courts. *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Duckworth*, 454 U.S. at 4. Nevertheless, the Supreme Court has stated that "there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies . . . ." *Granberry v. Greer*, 481 U.S. 129, 131, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987). As a result, we exercise our discretion not to reach the merits of the argument. Thus, we deny White habeas relief on this ground.

C.

White next argues that he received ineffective assistance of counsel during the mitigation phase of trial. White asserts that trial counsel were ineffective in failing to investigate,

failing to hire necessary experts such as a mitigation specialist and pharmacologist, and failing to prepare the sole expert-psychologist retained, Robert Smith, Ph.D. White raised this issue for the first time in post-conviction proceedings, and the Ohio Court of Appeals held that the claim was procedurally defaulted under *res judicata* because the claim could have been raised on direct appeal. *White*, 1998 Ohio App. LEXIS 4049, 1998 WL 515944, at * 8-9. According to the Ohio Court of Appeals, even though White introduced evidence outside the record on the ineffective assistance claim, the evidence did not meet the "minimum threshold of showing why defense counsel's use of defense experts could not have been brought as an ineffective assistance claim on direct appeal." 1998 Ohio App. LEXIS 4049, [WL] at * 9. The Court of Appeals also summarily stated that counsel's performance did not fall below the objective standard of reasonableness and that White was not prejudiced by the performance pursuant to *Strickland v. Washington*, 466 U.S. at 668, and therefore, White was not denied a fundamentally fair trial on this ground. 1998 Ohio App. LEXIS 4049, 1998 WL 515944, at * 9. The district court in reviewing this claim found that it was procedurally defaulted. The district court additionally noted that even if the claim were not procedurally defaulted, it would fail for lack of merit.

State v. Perry directs the courts of Ohio as follows:

> Under the doctrine of *res judicata*, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted

> in that judgment of conviction or on an appeal from that judgment.

10 Ohio St. 2d 175, 226 N.E.2d 104, 108 (Ohio 1967). We have generally recognized Ohio's *res judicata* ruling as an independent and adequate state ground to bar review of ineffective assistance claims on habeas. *Monzo v. Edwards*, 281 F.3d 568, 577 (6th Cir. 2002). However, the *Perry* rule by its own terms applies only where the issue "was raised or could have been raised by the defendant" at trial or on direct appeal. The Ohio Court of Appeals has found that a petitioner may properly bring a claim in post-conviction proceedings where he asserts evidence outside the original trial record. *State v. Gibson*, 69 Ohio App. 2d 91, 430 N.E.2d 954, 957 (Ohio App. Ct. 1980). White introduced evidence outside the record to support the ineffective assistance claim during the post-conviction proceeding in the form of an affidavit from the mitigation expert, Dr. Smith, as well as affidavits from two additional experts.

We held in *Hill v. Mitchell*, 400 F.3d 308 (6th Cir. 2005), on facts very similar to those presented here, that the ineffective assistance claim was not procedurally defaulted because of evidence submitted outside the record and therefore, we disposed of the issue on the merits. *Id.* at 314. In *Hill*, the defendant raised a claim of ineffective assistance of counsel at the mitigation phase based on an argument that the defense counsel failed to sufficiently prepare the mitigation expert and therefore failed to present adequate mitigation. In support of this claim, the defendant introduced evidence outside the record in the form of a post-trial affidavit from the expert who testified during the mitigation phase as well as an affidavit from an additional expert. *Id.* Relying on language in *Greer v. Mitchell*, 264 F.3d 663, 675 (6th Cir. 2001), which states that "when the record reveals that the state court's reliance upon its own rule of procedural

default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded," the *Hill* court affirmed the district court's decision to treat the claim as not procedurally defaulted based on the fact that ineffective assistance claims are not barred in Ohio when they rely in evidence outside the trial record. *Id.* Because of the similarity of claims and quality of evidence presented in this case to that presented in the *Hill* case, we conclude that White's ineffective assistance of appellate counsel claim is not procedurally defaulted. Therefore, we will review the merits of the claim.

Because the claim has not been reviewed on the merits by the state court, AEDPA deference does not apply. We thus review White's ineffective assistance of appellate counsel claim *de novo*. *See Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003) ("Where, as here, the state court did not assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply. Instead this court reviews questions of law and mixed questions of law and fact *de novo*.") (internal citation omitted).

In order to establish a claim of ineffective assistance of counsel, White must demonstrate first that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Second, White must show that counsel's deficient performance prejudiced him. This requires a showing that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* In reviewing the ineffective assistance claim, we are mindful of the fact that there is a strong presumption in favor of finding that counsel's performance "falls within the wide range of reasonable professional assistance." *Id.* at 689. Without a showing of both deficient performance and prejudice, White cannot

succeed on his constitutional challenge to the effectiveness of counsel. *See id.* at 687.

White looks to Dr. Smith's post-trial affidavit as evidence of the fact that trial counsel's poor preparation and failure to provide Dr. Smith with adequate information despite repeated requests prevented Dr. Smith from conducting in-person interviews with White's mother and sister or from interviewing other family members, co-workers, and friends. White asserts that these individuals could have confirmed White's history of alcohol and substance abuse. Further, White asserts that had trial counsel better prepared Dr. Smith, he would have had access to medical, employment, and police records.

A review of Dr. Smith's trial testimony undermines White's assertions of trial counsel's failings. On direct examination during the sentencing phase of the trial, Dr. Smith testified that trial counsel contacted him in May 1996 to conduct a psychological examination of White. To prepare for the examination, Dr. Smith reviewed a forensic report from the Forensic Diagnostic Center, medical records, school records, military records, reports regarding White's education and training, a toxicology report, a record of White's traffic violations, and news articles concerning White's military experience. Dr. Smith then met with White on June 2, 1996, and conducted a diagnostic interview and administered several psychological tests, including the Michigan Alcoholism Screening Test, the Drug Abuse Screening Test, the Substance Abuse Subtle Screening Inventory, Beck Impressions Inventory, and the Symptom Checklist 90. Dr. Smith interviewed Jean White, White's mother, on June 12, and interviewed Dorothy Mae White, White's sister, on June 13.

When cross-examined, Dr. Smith stated that he was able to accurately ascertain White's mental state from the interviews conducted with Jean and Dorothy Mae White. Dr.

Smith also testified that he did not attempt to interview any other individuals in addition to White's mother and sister, stating that "when I'm doing an evaluation, it's rare for me to be able to do extensive interviews of coworkers or probation officers or counselors or school teachers simply because of the limitations of time." Dr. Smith stated further that conducting telephone interviews with other individuals in connection with the case would have made him uncomfortable.

Even assuming that trial counsel's performance was in some way deficient, White cannot make the requisite showing of prejudice under *Strickland*, and therefore, his claim fails. *See Strickland*, 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one."). A review of the record reveals that Dr. Smith conducted an extensive review of documents in preparation for interviewing White, spoke with White's close family members, and examined White himself. Dr. Smith also administered numerous tests on White in order to assess White's mental state. Dr. Smith was also privy to a competency report prepared by Dr. Sunbury, the psychiatrist who interviewed White for purposes of determining his competency to stand trial. At trial, White's counsel called witnesses to present evidence regarding White's alcoholism as well as his troubled childhood. Dr. Smith also presented to the jury his opinion that White suffered from substance dependence and dysthymic disorders. Dr. Smith himself testified at trial that he had adequate information before him upon which to provide an accurate mental health diagnosis. Furthermore, the fact that Dr. Smith indicated at trial that there was nothing unusual in his preparation for the case supports our finding that White

was not prejudiced by trial counsel's performance. *See Hill*, 400 F.3d at 315-16 (noting that defendant was not prejudiced by claimed failure of trial counsel to present adequate mitigation where expert conducted his evaluation of the defendant in customary manner). Dr. Smith's affidavit does not identify any concrete benefit of which White was deprived by trial counsel's performance, and therefore, White's claim of ineffective assistance fails.

White argues further that trial counsel should have retained a mitigation specialist to provide a more complete account of White's history to the jury. In support of this claim, White relies on an affidavit prepared by Dr. Janice D. Ort, a clinical psychologist, for submission during post-conviction proceedings. In this affidavit, Dr. Ort states that upon review of the record in White's case, it was her opinion that trial counsel failed to obtain a complete life history of White due to their failure to conduct more extensive interviews and obtain further records and documentary evidence. Dr. Ort also conducted an evaluation of White and submitted a complete psychological report.

Following a psychological evaluation, Dr. Ort diagnosed White with an unspecified delusional disorder, bipolar disorder, and personality disorder with narcissistic, paranoid, and antisocial features. Due to his mental state, Dr. Ort opined that White is "always on guard, suspicious, and distrusting of others," possesses a "grandiose sense of self-importance or uniqueness, preoccupation with fantasies of success, and an exhibitionistic need for constant attention and admiration," although the "grandiosity is a tenuous front to an[] underlying self doubt," and experiences difficulty "modulating his emotional responses," which is exacerbated by his substance abuse. Dr. Ort asserted that Dr. Smith's diagnosis of dysthymia was incorrect but understandable due to the "paucity of materials available to him" in making his diagnosis.

In comparison, Dr. Smith described White's dysthymia at trial as a disorder characterized as a "reaction to the ongoing environment in which the person feels that they are inadequate, that their efforts to be successful in life are constantly thwarted, where they are either abused or neglected." Dr. Smith focused on the abusive and demeaning treatment White suffered at the hands of his father as the source of many of his mental problems. Dr. Smith also testified that White's troubled relationship with his father caused him to turn to alcohol and drugs, which detrimentally affected his behavior. Dr. Smith testified that while White was capable of interacting normally with people when sober, he "changed dramatically when abusing alcohol and drugs, becoming difficult to talk [and] interact with, . . . more withdrawn and isolated," and experienced "more mood swings and aggressive behavior."

We do not find a meaningful difference in the two diagnoses as they pertain to the legal considerations relevant here, and therefore, we find that White cannot show prejudice as a result of his trial counsel's performance. Both Dr. Ort and Dr. Smith testified that problems stemming from childhood manifested themselves in disorders which led to troubled social interactions. Both Dr. Ort and Dr. Smith also indicated that the problems White suffered were exacerbated by his substance abuse. As a result, we find that White cannot establish prejudice by relying on Dr. Ort's affidavit.[3]

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[3] In so holding, we note that Dr. Ort's diagnosis of paranoia and narcissism is remarkably consistent with the prosecution's closing remarks. In describing White's behavior, the prosecutor stated:

> He is cold to the core. That's why he didn't cry for his mother while she was up here on the stand, because he doesn't feel it. You and I feel for Jean White. He

Finally, White contends that trial counsel should have retained additional experts to explain the effect of intoxication on White at the time of the crime. White submits an affidavit prepared by Charles T. Kandiko, Ph.D., a pharmacologist, who calculated White's blood alcohol content on the night of the murder to approximate its effect on White's emotional and mental state. Dr. Kandiko asserts that the amount of alcohol White consumed on the night of the murder would cause him to "experience loss of critical judgment and emotional instability."

The presentation of Dr. Kandiko's findings to the jury would have been cumulative, and therefore, White cannot establish prejudice by relying on this affidavit. The substance of Dr. Kandiko's findings was presented to the jury at both the guilt and penalty phases of the trial. The jury heard testimony from a trooper during the guilt phase that he detected the smell of alcohol on White's breath and body when he brought White to the Ashland County Sheriff's Department. Also, in a taped statement played for the jury at the guilt phase, Jean White stated that White was drunk at the time that he arrived home the night of the murder and that he was not "really in a good frame of mind." She indicated that

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> doesn't feel it. That's why he didn't cry for Veronica Gross or Barbara Gross, because he doesn't feel it what you and I feel. He cried for himself. That's the way he is.

Had Dr. Ort's opinion been available to the jury, her comments about White's inability to interact normally with others may have served to reinforce, rather than counterbalance, the prosecution's theory. As a result, White cannot possibly show prejudice.

she had never before seen White behave in such a hostile manner or appear to be in "such bad shape." Dr. Smith testified during the penalty phase about the effect alcohol consumption had on White's mood and behavior. The opinion of Dr. Kandiko would merely have repeated information that had already been placed before the jury regarding the effect of alcohol on White on the night of the murder.

D.

White argues that the extensive nature of the publicity surrounding his arrest and trial deprived him of a fundamentally fair trial. He further contends that the voir dire conducted to screen out those jurors who were biased due to pretrial publicity was insufficient such that the predispositions of the jurors could not be ascertained. The Ohio Supreme Court rejected these contentions on the merits, finding that the voir dire conducted was adequate and that White had failed to prove that the jury was prejudiced by pretrial publicity. *White*, 693 N.E.2d at 778. The district court held that the state court's conclusion was not an unreasonable application of Supreme Court precedent.

"The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). We must ask in reviewing this claim "not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). A trial court's finding of juror impartiality may only be overturned where manifest error is present. *Mu'Min v. Virginia*, 500 U.S. 415, 428, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991).

White argues that prejudice may be presumed from the widespread nature of publicity preceding his trial. "In

extraordinary cases, where the trial atmosphere has been utterly corrupted by press coverage, a court must presume that pre-trial publicity has engendered prejudice in the members of the venire." *Williams v. Bagley*, 380 F.3d 932, 945 (6th Cir. 2004) (internal citation and quotation marks omitted). However, "mere prior knowledge of the existence of the case, or familiarity with the issues involved, or even some preexisting opinion as to the merits, does not in and of itself raise a presumption of jury taint." *DeLisle v. Rivers*, 161 F.3d 370, 382 (6th Cir. 1998) (en banc).

White claims that Ohio citizens were "inundated" with information about the crime and his connection to it as a result of the media. In support of this claim, White submits over five hundred pages of newspaper clippings written about the crime as well as the trial. However, our review of these articles leads us to conclude that the articles were not inflammatory, but were "straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness." *Beck v. Washington*, 369 U.S. 541, 556, 82 S. Ct. 955, 8 L. Ed. 2d 98 (1962). Furthermore, only a small minority of the articles pre-dated the trial; the majority of the articles were published either during the pendency of the trial, when the jury was prohibited from reading or listening to media coverage of the trial, or after the completion of the trial.

We contrast the situation presented here with that present in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), a case where the Supreme Court found that the defendant had been denied a fair trial due to the "massive, pervasive and prejudicial publicity that attended his prosecution." *Id.* at 335. In that case, significant publicity pre-dated the defendant's arrest. After the trial began, the jury was not sequestered, and the judge made no effort to restrict the jurors' access to media coverage of the trial. *Id.* at 357. The Supreme Court described the commotion caused within the courtroom by the media as "unprecedented,"

indicating that the circumstances surrounding the trial in that case were truly extraordinary. In contrast, such an unusual environment surrounding trial was not present in White's case, as the jury was sequestered during the deliberations on White's guilt or innocence and during the entire sentencing phase of the trial. Further, the trial court employed a variety of precautionary measures to guard the jury against undue prejudice from the media, including the institution of a pre-trial gag order to limit the information available to the media about the trial as well as the imposition of restrictions on the media's activities within the courtroom so as to minimize the possibility that their presence would distract the jury. White fails to articulate any specific occurrences or otherwise provide evidence from which a presumption of prejudice would be appropriate; indeed, White's argument that he was prejudiced by the media coverage "rests almost entirely upon the quantum of publicity which the events received," *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), and consequently, we reject his petition for habeas relief on this ground.

White also argues that the pre-trial publicity to which the jurors were exposed caused actual prejudice among the jury pool and that the voir dire conducted was inadequate to reveal the prejudice. In order to demonstrate actual prejudice, White must show through a review of voir dire testimony and the extent and nature of the publicity that "a fair trial was impossible." *Ritchie v. Rogers*, 313 F.3d 948, 952 (6th Cir. 2002) (citation, internal quotation marks and alteration omitted). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723.

In support of this argument, White points to the fact that sixteen of the sixty-three potential jurors stated that they had formed opinions regarding White's guilt. Of those sixteen individuals in the jury pool, however, only one, juror Susanne Sheppard, was not excused for cause. Moreover, defense counsel withdrew their challenge to Sheppard based on the possibility of prejudice from pretrial publicity after successfully rehabilitating her for the guilt phase of the trial.[4] Because we do not find actual prejudice upon our review of the voir dire transcript due to pretrial publicity, we reject White's claim for habeas relief on this ground.

E.

White contends that we should remand his case to the district court for purposes of conducting an evidentiary hearing concerning his claims of juror bias. He seeks an evidentiary hearing with regard to both his claim of juror bias among the jury pool stemming from pre-trial publicity, discussed *supra*, and his claim of juror bias with respect to Sheppard individually, which will be addressed below. The district court's decision not to conduct an evidentiary hearing is reviewed for an abuse of discretion. *Alley v. Bell*, 307 F.3d 380, 389 (6th Cir. 2002).

AEDPA states:

> (2) If the applicant has failed to develop the factual basis for a claim in State court proceedings, the court shall not hold an

[4] The defense counsel's objection to juror Sheppard with regard to the penalty phase of the trial based on her strong inclination to impose the death penalty, discussed *infra*, is independent from the analysis regarding her ability to be impartial with respect to pretrial publicity at the guilt phase of White's trial.

> evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable, or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). A failure to establish the factual basis is not established unless there is a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 146 L. Ed. 2d at 432. The exercise of diligence "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court[,] . . . not . . . upon whether those efforts could have been successful." *Id.* at 435.

With respect to the claim of juror bias based on pre-trial publicity, we find that the district court's decision not to conduct an evidentiary hearing was not an abuse of discretion. The record indicates that White did not raise the issue of possible bias due to pre-trial publicity at trial, which

would have been his earliest opportunity. Instead, he raised the issue for the first time on direct appeal and was unsuccessful, as the Ohio Supreme Court found that the voir dire conducted at his trial was adequate to reveal juror prejudice. *White*, 693 N.E.2d at 778. It was not until post-conviction proceedings that White presented evidence in support of his claim of presumed and actual juror bias resulting from pre-trial publicity. *White*, 1998 Ohio App. LEXIS 4049, 1998 WL 515944, at * 7. The Ohio Court of Appeals found that the claim was both lacking in merit and barred by *res judicata* . *Id.* The district court found that an evidentiary hearing was unnecessary to dispose of the claim. In light of the fact that we find the claim of juror bias based on pre-trial publicity clearly meritless, we find that the district court did not abuse its discretion in deciding not to conduct an evidentiary hearing.

F.

White argues next that he was denied a fundamentally fair trial due to the instructions submitted to the jury regarding the reasonable doubt standard and the weighing of aggravating and mitigating circumstances as well as by the court's failure to submit to the jury the instructions proposed by White. The Ohio Supreme Court rejected this claim without comment. *White*, 693 N.E.2d at 777. The district court found that none of these contentions possessed merit.

Errors in jury instructions must be so egregious that they render the entire trial fundamentally unfair. *Austin v. Bell*, 126 F.3d 843, 846 (6th Cir. 1997). Without such a showing, no constitutional violation is established and the petitioner is not entitled to relief. *Id.* White argues that the reasonable doubt instruction submitted to the jury at the penalty phase violated his due process rights because it instructed the jury to sentence White to death if it was "firmly convinced of the truth of the charge." White argues that because he had already been convicted of the crime when this instruction

was given, the reasonable doubt instruction required that the jury impose a death sentence with no further deliberation needed or allowed.

The trial judge instructed the jury at the mitigation phase as follows:

> "Reasonable doubt" is present when after you have carefully considered and compared all the evidence you cannot say that you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

The charge incorporates Ohio's statutory definition of reasonable doubt. Ohio Rev. Code § 2901.05(D). We have specifically ruled that Ohio's articulation of the reasonable doubt standard does not offend due process. *Buell v. Mitchell*, 274 F.3d 337, 366 (6th Cir. 2001). Moreover, we rejected an identical challenge to the reasonable doubt instruction in *Coleman v. Mitchell*, 268 F.3d 417, 437 (6th Cir. 2001). Therefore, we reject the claim.

White next contends that the court's instructions regarding mitigating factors to be considered by the jury as well as the jury's duty to weigh aggravating and mitigating factors violated his due process rights. White argues that the instructions failed to define mitigating factors, failed to ensure that the jury considered the mitigating factors, and failed to instruct the jury with regard to the appropriate weight to attach to the mitigating factors.

The court identified the two aggravating circumstances present in this case: the fact that the victim was known by White to be a police officer at the time of the crime and the fact that the crime was committed for the purpose of escaping detection or apprehension for a prior offense. The trial court next charged the jury as follows:

> So you are to consider all the evidence, arguments, the statement of the Defendant, the presentence investigation, the mental examination report, and all other information and reports which are relevant to the nature and circumstances as-that are relevant to the nature and circumstances of the aggravating circumstances, as I have outlined those for you, or to any mitigating factors, including but not limited to the nature and circumstances of the offense, and the history, character and background of the Defendant, and of the following: the youth of the Defendant; the Defendant's lack of a significant history of prior criminal convictions and delinquency adjudications; and any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.
>
> Now the prosecutor in this case has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweigh the factors in mitigation of imposing the death sentence.

White's claim lacks merit. The jury instruction properly informs the jury of its duty to balance the aggravating circumstances against the mitigating factors present in the case. The Supreme Court has declined to create specific requirements with regard to how the jury should be instructed

on mitigating factors. The Court has made clear that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998). However, the Court has "never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* As a result, we find that the jury instructions on mitigating factors were constitutionally adequate.

Finally, White argues that his constitutional rights were violated because the court failed to submit his proposed instructions to the jury. White fails to identify a precise constitutional error which occurred as a result of the court's failure to utilize his proposed instruction. Where the trial court instructs the jury in accordance with state law and sufficiently addresses the matters of law at issue, no error results and the petitioner is not entitled to habeas relief. *Sanders v. Freeman*, 221 F.3d 846, 860 (6th Cir. 2000). Thus, the trial court's decision not to instruct the jury as White requested is not contrary to federal law and we consequently deny White's habeas petition on this ground.

G.

White next contends that the trial court erroneously believed that White would be eligible for good time credit if he received a sentence of imprisonment for a term of years, provided inaccurate information about parole eligibility to the jury, and improperly considered future dangerousness as a non-statutory aggravating factor. The Ohio Supreme Court rejected this claim without comment. *White*, 693 N.E.2d at 777. On habeas review, the district court concluded that White had not suffered a constitutional violation with regard to any aspect of this claim. First, the district court found that the trial court did not convey to the jury its mistaken belief regarding eligibility for good time credit if a life sentence

were imposed. The district court further noted that the jury instructions stated that parole eligibility if a life sentence were imposed occurred after the service of either twenty or thirty full years, and reasoned that a juror would interpret this information to mean that White was not eligible for parole until this time was expired due to the use of the word "full." We find no error in either of these rulings from the district court, and therefore reject these claims.

Finally, the district court found that the trial court did not err in considering future dangerousness during final sentencing. White contends, contrary to the district court's ruling, that the district court erred because it did not follow state law, which does not permit the consideration of future dangerousness at sentencing. In order to prevail on this claim, White must show that: (1) the trial court considered extra-statutory aggravating factors, (2) any errors were not corrected by the state appeals process, and (3) the consideration of extra-statutory aggravating factors so infected the balancing process as to render the ultimate sentence constitutionally infirm. *Fox v. Coyle*, 271 F.3d 658, 665 (6th Cir. 2001).

In support of this contention, White points to the trial court's comments at the sentencing hearing where the trial court opined that White's negative childhood experiences caused him to be "a person with dangerous propensities likely to explode at any time," and "a human time bomb waiting to explode." The trial court also stated that the murder of Trooper Gross was a product of White's explosive nature, and that there was no reason to believe that a similar event would not occur "unless action is now taken to permanently prevent it." However, notwithstanding these oral comments, the trial court's final sentencing report, mandated by Ohio Revised Code § 2929.03, does not indicate that future dangerousness was considered in arriving at White's sentence. Furthermore, even if the trial court did improperly consider future dangerousness, the Ohio Supreme Court

undertook an independent reweighing of the aggravating and mitigating factors without considering future dangerousness and still concluded that a death sentence was properly imposed upon White. Because any error that the trial court may have committed was corrected in the state appeals process, we reject White's argument on this issue.

H.

White next alleges that the prosecutor and the trial court improperly used information from a court-ordered competency evaluation of the petitioner to misinform the jury regarding the necessity of considering certain mitigation testimony. Dr. Sunbury's report summarizing the competency evaluation stated that White showed no indication of having previously suffered or of currently suffering from a mental disease or defect. The report further expressed the opinion that White understood the difference between right and wrong on the day of Trooper Gross's murder. He contends that this use of the evaluation effectively precluded the jury's consideration of whether he possessed a mental illness or disease. Additionally, White argues that because his statements during the competency evaluation were used against him at the sentencing hearing, the failure of the issuance of *Miranda* warnings prior to the evaluation deprived him of a fundamentally fair trial and violated his Fifth Amendment right against self-incrimination. The Ohio Supreme Court denied this claim without comment. *White*, 693 N.E.2d at 777. The district court reviewed these claims on the merits and found them to be meritless. In reaching this conclusion, the court noted that White was informed prior to the evaluation that the communication with the psychologist conducting the evaluation would not be confidential and that the trial judge would be apprised of the result. The district court further found that White suffered no prejudice from the admission of the competency report because the use of the report did not affect the outcome of the sentencing phase of the trial.

Relying on *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), White first claims that the use of Dr. Sunbury's competency report to cross-examine the mitigation expert, Dr. Smith, as well as the prosecutor's references to the competency report during closing argument, effectively prevented the jury from considering White's mental state as a mitigating factor. We decline to reach this argument on appeal. With regard to the use of Dr. Sunbury's competency evaluation, the certificate of appealability granted in this case limited the scope of review to the issue of "whether White's Fifth Amendment right against self-incrimination was violated stemming from his interaction with Dr. Sunbury." Thus, White's argument regarding the prosecutor's use of the testimony to preclude the jury's consideration of White's mental state is not properly before us on appeal.[5]

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[5] In any event, the argument is totally devoid of merit. As the district court noted, *Eddings* stands for the proposition that a sentencer may not, as a matter of law, refuse to consider any mitigating evidence presented. 455 U.S. at 114. The Court was clear in *Eddings*, however, that the constitutional violation arose not from the sentencer "evaluating the evidence in mitigation and find[ing] it wanting as a matter of fact," but rather because he found "*as a matter of law* he was unable even to consider the evidence." *Id.* at 113. As the Court explained, "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114.

In this case, the mitigating evidence regarding White's mental state at the time of the murder was before the jury. The fact that Dr. Sunbury's competency report was used to challenge that evidence in no way prevented the jury from considering it. As a result, White would not be entitled to

Second, White argues that the use of Dr. Sunbury's competency report to rebut the testimony of Dr. Smith violated his Fifth Amendment right against self-incrimination pursuant to *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). The Supreme Court held in *Estelle* that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468. Because White does not fall within the class of defendants covered by the *Estelle* ruling, he is unable to avail himself of *Estelle* 's protection. White initially entered a plea of not guilty by reason of insanity and requested an evaluation for competency to stand trial, causing the trial court to order the psychiatric evaluation. White was found to be competent to stand trial, and thereafter withdrew his insanity plea. During the penalty phase of trial, White introduced the testimony of Dr. Smith to provide mitigating evidence regarding his mental state, and in the course of testifying, Dr. Smith referred to Dr. Sunbury's report as part of the materials he reviewed in reaching a diagnosis. Because White initiated the psychiatric evaluation and because Dr. Sunbury's report was used on cross-examination for purposes of rebutting Dr. Smith's findings, the Court's ruling in *Estelle* was not violated. Furthermore, White was informed that the written report as well as the statements made during the interview would not be confidential. Thus, we reject this argument.

I.

Finally, White argues that he was denied a fundamentally fair trial due to the fact that Susanne Sheppard, an allegedly biased juror, was allowed to remain on the jury over defense counsel's objection for cause. White contends that Sheppard

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habeas relief on this ground even if the issue were properly before the court.

had already formed an opinion with regard to (1) his guilt and (2) the appropriate penalty and that, for this reason, she should have been removed by the trial judge. The Ohio Supreme Court found that, although "the challenged juror expressed repeated concerns over whether she could be fair to the appellant[,] . . . she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt." *White*, 693 N.E.2d at 777. The district court likewise found that although juror Sheppard "initially expressed hesitation" regarding her ability to be a fair and impartial juror, she ultimately "asserted that she could follow the dictates of the law," and thus, the Ohio Supreme Court ruling on this issue was not unreasonable under AEDPA. In so holding, the district court noted White's argument that Sheppard's testimony was equivocal, but cited the Supreme Court's ruling in *Patton*, 467 U.S. at 1039, for the proposition that juror testimony is often contradictory and ambiguous, particularly where the case has received a great deal of publicity. The court further cited *Patton* for the proposition that the question of juror impartiality is largely one of credibility, and thus, the trial court's determination is entitled to "special deference." *Patton*, 467 U.S. at 1038.

The right to jury trial guaranteed by the Sixth Amendment to the United States Constitution "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722. The right to an impartial jury does not entitle a defendant to a panel of jurors who are entirely ignorant of the existence of his case. *Id.* However, it is imperative that a juror be able to "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723. As noted above, it is not uncommon for jurors to express themselves in contradictory and ambiguous ways, both due to unfamiliarity with courtroom proceedings and cross-examination tactics and because the jury pool runs the spectrum in terms of

education and experience. *Patton*, 467 U.S. at 1039. As a result, the trial court's determination on a given juror's credibility is entitled to "special deference." *Id.* at 1038. The ultimate question is whether the "juror swore that he could set aside any opinion he might hold and decide the case on the evidence, and [whether] the juror's protestation of impartiality [should be] believed." *Id.* at 1036.

With respect to juror impartiality on the specific issue of capital punishment, "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980). A juror who would automatically vote for the imposition of the death penalty without weighing the aggravating and mitigating evidence presented must be removed for cause, and a failure of trial court to do so rises to the level of constitutional error sufficient to grant habeas relief. *Morgan v. Illinois*, 504 U.S. 719, 728-29, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). A trial judge's finding of juror impartiality may only be overturned where manifest error is shown. *Patton*, 467 U.S. at 1031. Because juror impartiality is a factual determination, the state court's findings are entitled to a presumption of correctness. 28 U.S.C. § 2254; *see Wainwright v. Witt*, 469 U.S. 412, 428-29, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

With respect to the voir dire conducted to determine the impartiality of jurors as to the guilt phase of trial, Sheppard initially expressed strong doubts as to whether she could serve on the jury, stating, "To be honest, when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there." As defense counsel attempted to rehabilitate her, she resisted revising her stance, stating, "I still feel-I mean I will be willing to listen to everything, but I

still feel too strong [sic] about this." Defense counsel asked her whether it would be correct to assume that anything the defense presented would fail to change Sheppard's mind, to which she answered affirmatively. At this point, defense counsel challenged Sheppard for cause, and the trial judge delayed ruling on the challenge until the prosecution had an opportunity to ask her a few questions.

The prosecutor explained to Sheppard that the information that she had received through the media was not evidence, a notion which Sheppard indicated that she understood. At first, Sheppard reiterated the fact that she had already decided on her view of the proper outcome of the case: "I feel I could [listen to the testimony presented], once I heard all the evidence, that as I feel strongly I'm going to hear the evidence that I believe in now." However, upon further questioning, Sheppard indicated that she would be able to decide the case based only on the evidence presented at trial. Defense counsel then engaged in further questioning of Sheppard. Sheppard stated:

> I haven't heard the evidence as far as someone sitting up there. Just from the media. And I still do have an opinion about this, and you will have to work hard to change that opinion. But I am a fair person. And I am willing to listen to all the evidence and then make my final decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there.

Sheppard then indicated that if she were in Defendant White's position, she would want a person like herself sitting on the jury, because she is "a very honest person." Defense counsel then asked her to "look [him] in the eye and tell [him] that you can put [your opinion] aside and decide this

case on the evidence, not what your opinion is or what you feel right now," to which Sheppard responded that she could. At this point, after indicating that he believed she was telling the truth, defense counsel withdrew his challenge for cause to Sheppard.

With respect to this portion of Sheppard's voir dire, White cannot meet the standard necessary to obtain habeas relief. While Sheppard was initially quite hesitant on the question of whether she could be fair and impartial, upon further questioning, she unequivocally stated that she could set aside any previously formed opinion and decide the question of White's guilt based on the evidence presented as required by *Irvin*. Especially in light of the special deference owed to a trial judge's determination of juror impartiality as well as the deferential standard for reviewing factual findings under § 2254, we cannot say that the Ohio Supreme Court's ruling on this issue was unreasonable. Thus, if this were the only portion of voir dire to which White objected, his claim for habeas relief would be appropriately denied.

However, this is not the only portion of voir dire to which White raises a challenge. Juror Sheppard was reexamined with respect to her impartiality as to the sentencing phase of the trial. With respect to this portion of the voir dire testimony, Sheppard's statements were far more troubling and equivocal, and efforts to rehabilitate her were far less successful. Of critical importance, Sheppard's statements in this part of the voir dire went beyond an issue of ability to abandon a preconceived opinion and extended to an eagerness to impose the death penalty in this particular case. Consequently, White's claim of juror impartiality is much stronger with regard to this portion of the voir dire transcript.

When Sheppard was questioned by the prosecution regarding whether she could follow the court's instructions with regard to the sentencing phase of the trial, she stated, "I have mixed emotions on that because I feel-I am for the

death penalty."-The prosecution then explained to Sheppard that while it was acceptable for her to have her own views on the death penalty, members of the jury would be required to follow the law in determining whether imposition of the death penalty was warranted, and then asked Sheppard if she would be able to follow the law as stated by the judge in the case. Sheppard replied:

> I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and to be honest, I don't think I would be fair to the defendant.

Thus, with this answer, Sheppard made both a very strong statement indicating that she would not be fair to defendant White, and also referred back to the previous answers she gave during voir dire, seemingly retreating from her previous statements that she could be fair and impartial despite any previously formed beliefs regarding the case. The prosecution next asked Sheppard again whether her answer indicated that she would be unable to follow the law as presented rather than "do[ing] instead what [she] wanted to do," Sheppard responded:

> I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it is a strong enough doubt. I just want you to be aware of it.

Sheppard then indicated that she would not automatically vote for the death penalty, stating, "I am in favor of it as long as it's proven that it should be given."

Defense counsel then questioned Sheppard. Sheppard indicated that she would be willing to weigh mitigating factors against aggravating factors in deliberations over whether to impose the death penalty. Defense counsel next attempted to follow up on Sheppard's stated concerns regarding her ability to be fair to Defendant White, eliciting the following exchange:

> Defense counsel Whitney: You indicated early on, Mrs. Sheppard, in this proceeding here that you felt that you could not be fair to the Defendant Max White with reference to the penalty part of this proceeding, if we get to the penalty part of this proceeding. As you sit here now, do you still possess that feeling that you could not be fair to the defendant in the penalty part of this proceeding if we got to it?
>
> Juror Sheppard: I think to a certain degree, yes.
>
> Defense counsel Whitney: That you could not be fair?
>
> Juror Sheppard: I could not.
>
> Defense counsel Whitney: In other words, as you sit here now, do you have an opinion as to what you feel the penalty should be in this particular case?

> Juror Sheppard: Like I indicated earlier, if the facts prove that he is guilty, yes, I have a strong belief.
>
> Defense counsel Whitney: All right. Without hearing any mitigation, without any further evidence?
>
> Juror Sheppard: I know that completely doesn't feel fair and I know--I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, but I still have a little bit of doubt. And I think for a person's life, there should not be any doubt whatsoever.
>
> Defense counsel Whitney: You feel that you should not serve as a juror in this cause because of that?
>
> Juror Sheppard: What? Yes.

At this point, defense counsel renewed his challenge to Sheppard for cause.

The prosecution then questioned Sheppard again. The prosecution explained that the trial judge would instruct the jury at the penalty phase on how to weigh the evidence, and asked again whether Sheppard could follow the instructions, to which Sheppard replied, "Like I have stated, I feel I could do this, but yet, I still have that little bit of doubt that I couldn't." The prosecution then asked Sheppard whether she was "willing to attempt" to follow the law, to which Sheppard responded that she would. The prosecution explained again that it was important that Sheppard be able to set aside her personal feelings and follow the law, and asked

whether she was capable of "obey[ing] the law to the best of [her] ability," to which Sheppard responded,

> When I walked in here today, it was-I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the real truth. And if we come to the truth that I feel we're going to, and I hate to see one man's life taken, but in fair honesty, in him taking another life, I think that he should be punished for that, and I'd like to be a part of that.

The prosecution then asked Sheppard again whether she would obey the law, to which she replied that she would.

Defense counsel questioned Sheppard one last time, asking her whether she would let her personal feelings and opinions interfere with her fairness and impartiality as a juror, to which she responded, "No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life." Defense counsel's questioning concluded with the following exchange:

> Defense counsel Whitney: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror?
>
> Juror Sheppard: Right.

> Defense counsel Whitney: You would listen to those with an open mind, unbiased by what you feel like you might want to do?
>
> Juror Sheppard: Yes.

At this point, the trial court overruled defense counsel's challenge for cause to Sheppard without comment.

Our review of the line of questioning as a whole reveals a series of highly troubling and contradictory statements made by Sheppard with regard to her ability to be a fair and impartial juror for the penalty phase of sentencing. Sheppard stated repeatedly that she had doubts as to whether she could follow the law, and explicitly stated, in contrast to her earlier voir dire statements, that she did not think it would be fair to the defendant for her to sit on the jury. As we read Sheppard's statements in their entirety, we are struck by the vacillating nature of her responses; she contradicts herself from question to question, sometimes openly equivocating during a single answer. Further, the prosecution's repeated comments to Sheppard that she need only try to the best of her ability to apply the law are an impermissibly lax statement of the duty of a juror to set aside her own views and apply the law as the judge presents it. *See Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000) (granting habeas relief based on a finding that it was unreasonable for a trial judge to fail to excuse two jurors who were unable to state unequivocally that they would set aside their personal beliefs and decide the case fairly and noting that "each juror's tentative statements that they would *try* to decide this case on the evidence presented at trial . . . . [was] without more, . . . insufficient.") (emphasis added).

Ultimately, however, the most problematic of Sheppard's comments are those about being a part of the Ashland community and feeling a duty to serve on the jury: her

statements strongly indicate that (1) she had already decided what punishment was appropriate and believed that the rest of the jurors would feel similarly: "And if we come to the truth *that I feel we are going to*, and I hate to see one man's life taken, but in fair honesty, in him taking another life, *I think that he should be punished for that*," (2) she relished taking part in the imposition of the death penalty in this particular case: " *and I'd like to be a part of that*," and (3) she believed that her anticipated outcome of the case was the true and honest one, thus reflecting an inherent bias: "people out there want people on that jury that's going to listen and find the *real truth*;" "And if we come to the *truth* that I feel we are going to;" "I hate to see one man's life taken, but in *fair honesty*, in him taking another life, I think he should be punished for that."

These statements not only indicate that Sheppard had a strong inclination toward imposing the death penalty, they also indicate that she was looking forward to participating in the imposition of this particular defendant's sentence. Further, her use of the words "fair," "truth," and "honesty" in the context of discussing preformed biases regarding the defendant make her claims of fairness and impartiality toward the defendant elsewhere in her voir dire testimony suspect. Although Sheppard stated subsequent to these comments that she could follow the law and not let her personal feelings interfere, her statements to this effect were far more cursory and, given the frequency with which her statements shifted back and forth on her ability to be fair, such subsequent statements are insufficient to alleviate the grave concerns raised by her previous comments.

In light of these facts, we find that juror Sheppard was unable to "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. Notwithstanding the deference owed to trial judges on issues of juror impartiality, Sheppard's statements fell far short of the dictates laid out in Supreme Court case

law regarding juror bias. *See Wolfe*, 232 F.3d at 504 (Wellford, J., concurring) (noting that although a trial court's determination of juror bias is entitled to deference, a judge's discretion is nonetheless "subject to the essential demands of fairness") (internal quotation marks and citation omitted). In our review of this claim, we are guided by the Supreme Court's holding in *Patton*, 467 U.S. at 1036. In that case, the Supreme Court stated that the appropriate question on review of a juror bias issue is "did a juror swear that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Id.* The second portion of that inquiry-whether the statements of the impartiality *should have been believed*--highlights the grave problem with Sheppard's voir dire testimony in this case. With a transcript reflecting statements as internally inconsistent and vacillating as these, including numerous statements of strong doubt regarding impartiality and merely a few tentative or cursory statements that she would be fair, Sheppard was simply unbelievable as an impartial juror. Despite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony. Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent.

In order to grant a writ of habeas corpus on this issue, we must finally consider whether the error resulting from Juror Sheppard's placement on the jury for the penalty phase of the trial resulted in "actual prejudice," in that it had "substantial and injurious effect or influence in determining the jury's verdict" pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). Because we find this standard is easily met on the facts of this case, we

find that White is entitled to habeas relief with respect to the sentencing phase on this ground.[6]

III.

For the foregoing reasons, we affirm the district court's denial of White's petition with regard to all of the issues raised with respect to his conviction. However, because we find that juror Susanne Sheppard was not believable as an impartial juror, we reverse the decision of the district court and remand the case to the district court with instructions to issue a writ of habeas corpus vacating White's death sentence unless the State conducts a new penalty phase proceeding within 180 days of remand.

MERRITT, Circuit Judge, concurring. I concur in the Court's opinion in Part I. issuing the writ as to the sentencing phase of the case for the reasons stated therein. I concur in the Court's opinion as to all of petitioner White's claims as to the guilt phase of the case. Having issued the writ as to the sentencing phase of the case on this basis, I would not reach the other claims as to the sentencing phase of the case. I would pretermit those claims. My view is that we need not reach the other sentencing phase claims and that an opinion on those claims is merely advisory, or at least merely dicta, unnecessary for the opinion to address.

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[6] In light of the fact that we are granting habeas relief on this issue, we find it unnecessary to address White's argument that the district court abused its discretion in failing to grant an evidentiary hearing on the issue.

APPENDIX B

Maxwell D. White, Jr., Petitioner-Appellant,
v.
Betty Mitchell, Warden, Respondent-Appellee.

No. 02-3073

United States Court Of Appeals For The Sixth Circuit

April 21, 2006, Filed

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MAXWELL D. WHITE, JR.,	)	JUDGE PAUL R. MATIA
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 1:99cv1565
	)	
BETTY MITCHELL,	)	
WARDEN	)	MEMORANDUM OF
	)	OPINION AND ORDER
Respondent.	)	

Maxwell D. White has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Petitioner challenges his conviction and sentence of death entered by the Court of Common Pleas of Ashland County, Ohio.

For the following reasons, the petition for a writ of habeas corpus is denied.

I. PROCEDUREAL HISTORY

Maxwell White, Petitioner, was indicted and charged with the aggravated murder of James Gross with three specifications pursuant to Ohio Revised Code § 2929.04(A)(3) (committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender); Ohio Revised Code § 2929.041(A)(6) (the victim was a peace officer whom the offender had reasonable cause to know or knew to be such,

and was engaged in his duties); Ohio Revised Code §2941.141 (the offender had a firearm about his person or under his control while committing the offense presented in Count I) In Count Two, Petitioner was charged with having weapons while under a disability pursuant to Ohio Revised Code § 2923.13(A)(2); and, in Count Three, abduction of Jean White pursuant to Ohio Revised Code § 2905.02(A)(2) with one specification (possessing a firearm on or about his person or under his control while committing the abduction pursuant to Ohio Revised Code § 2941.141).

On April 22, 1996, the trial court held a competency hearing. At that time, the court determined White competent to stand trial. Thereafter, on June 10, 1996, the trial against Petitioner commenced. Petitioner was represented by Robert and Rolf Whitney. On June 19, the jury returned a guilty verdict as to all charges and specifications. The mitigation phase of trial began on June 24, 1996. After deliberations, the jury recommended a sentence of death be imposed, and the trial court subsequently accepted the jury's recommendation. The trial court also sentenced White to eighteen months on the charge of having weapons while under a disability and five to ten years on the abduction charge, to be served consecutively. (Respondent Ex. 7.)

White filed a timely notice of appeal to the Court of Appeals for the Fifth Appellate District, which was dismissed for want of jurisdiction. White next filed a notice of appeal from both the common pleas and court of appeals to the Ohio Supreme Court. On January 22, 1996, the Ohio Supreme Court ordered the two appeals consolidated.

Represented by J. Joseph Bodine, Jr. and Gloria D. Brown from the Ohio Public Defender's Commission, Petitioner raised the following fifteen issues to the Ohio Supreme Court:

1. A prospective juror must be removed for cause when she unequivocally states that she is unable to set aside her belief that, the defendant is guilty. Failure to remove such a juror deprives a capital defendant of the rights to a fair trial, an impartial jury, a reliable sentencing determination and due process of the law.

2. When prosecutors infest a capital trial with invective and use disturbing physical evidence in such a manner that it inflames the jury, a capital defendant is denied his substantive and procedural due process rights to a fair trial as guaranteed by the Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, as well as Article I, § § 1, 2, 9, 10, 16, and 20 of the Ohio Constitution.

3. By refusing to properly instruct the jury on the defense of intoxication, the trial court denied appellant White the right to a fair trial and to due process of law. U.S. Const. Amend. VI and XIV. Ohio Const. Art. I, § § 1, 2, 9, 10, 16, and 20.

4. When a trial court refuses to provide the jury correct, relevant information about parole availability and relies upon a capital defendant's future dangerousness as an aggravating factor, a capital defendant is denied the right to a fair trial, due process of law and a reliable sentencing determination. U.S. Const. Amend. VI, VII, and XIV; Ohio Const. Art. I, § § 2, 5, 9, 10, 16, and 20.

5. When a trial court evaluates expert psychological testimony relevant to the mitigating factors in Ohio Revised Code Annotated Section 2929.04(8) under a sanity/competency standard and rewrites the expert's report before submitting it to the jury, a capital defendant is denied the rights to a fair trial, a reliable sentencing determination and due process of law. U.S. Const. Amends. VI, VIII, and XIV; Ohio Const. Art. I, § § 2, 9, 10, 16, and 20.

6. A capital defendant is denied his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and Article I, § §10 and 16 of the Ohio Constitution when gruesome and cumulative photographs and physical evidence are admitted into evidence when their prejudicial effect outweighs their probative value.

7. When every potential juror in a capital trial has been exposed to pre-trial publicity and not adequately voir dired to reveal prejudice, it is error for the trial court to conduct and allow cursory voir dire examinations to uncover such prejudice. Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 5, 10, and 16 of the Ohio Constitution.

8. When the trial court allows a capital trial to be video taped pursuant to the Rules of Superintendence and fails to make the video part of the record, a sufficient review of the record pursuant to Ohio Rev. Code Ann. § 2929.05 cannot be conducted. U.S. Const. Amend. XIV; Ohio Const. Art. I, § § 1, 2, 3, 5, 10 and 16.

9. When defense counsel failed to object to obvious constitutional errors during trial and use trial strategies that are harmful to their client, a capital defendant is deprived of the right to the effective assistance of counsel that is guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, § §9, 10, and 16 of the Ohio Constitution.

10. A trial court denies a capital defendant the right to a fair trial and to due process of law when it erroneously instructs the jury or fails to instruct the jury during the trial and penalty phases of a capital trial.

11. A capital defendant has the right to be present at all proceedings. U.S. Const. Amend. VI, VII, XIV; Ohio Const. Art. I., § § 2, 5, 9, 10, 16, and 20.

12. A capital appellant, challenging his death sentence as disproportionate to cases in which the same or similar crimes were committed, is denied due process and equal protection when the reviewing court limits the pool of cases for comparison to only those cases in which the death penalty was imposed and then failing to engage in any meaningful review.

13. A change in the Ohio Constitution, which provides less review to capital appellants (whose crimes were committed on or after January 1, 1995) violates the Fourteenth Amendment and fails to provide the meaningful appellate review mandated by the Eighth Amendment.

14. The trial court erred by sentencing Mr. White to death in violation of treaties to which the United States of America is a signatory in violation of the Supremacy Clause of the United States Constitution.

15. The death penalty authorized by the Ohio Revised Code deprives the capitally-charged defendants of their lives without due process of law, denies equal protection and imposes cruel and unusual punishment in violation of the Ohio and United States Constitutions.

(Respondent Ex. 9.) On May 20, 1998, the Ohio Supreme Court affirmed White's conviction and death sentence. *State v. White*, 693 N.E.2d 772 (Ohio 1998) . White filed a petition for certiorari with the United States Supreme Court on December 14, 1998. The Court, however, denied the petition. *White v. Ohio*, 525 U.S. 1057 (1998).

White, represented by Lori Ann McGinnis and Cynthia A. Yost, filed a petition for post-conviction relief. (Respondent Ex. 15.) Petitioner initially raised the following issues to the trial court:

1. Prosecutorial misconduct

2. Improper appellate review

3. The death penalty is administered through arbitrary and capricious means in Ohio

4. The Petitioner was denied the right to a fair and impartial jury because of pre-trial publicity

5. The Petitioner was denied the right to a fair and impartial jury because Juror Sheppard indicated she was unable to put aside her belief that Petitioner was guilty of aggravated murder

6. Ineffective assistance of counsel during the penalty phase of trial

7. Ineffective assistance of counsel during all phases of trial

8. The jury did not receive correct, relevant and pertinent information about Petitioner's parole availability and other erroneous jury instructions

(Respondent Ex. 15.) On May 29, 1997, the trial court granted White permission to amend his post-conviction petition to include additional exhibits. (Respondent Ex. 16.) Thereafter, Respondent filed a motion to dismiss White's petition. (Respondent Ex. 17.)

On July 30, 1997, the Ashland County Court of

Common Pleas held a hearing regarding the state's motion to dismiss White's petition. That court later granted the state's motion and dismissed White's post-conviction petition on August 18, 1997. (Respondent Ex. 21; *State v. White*, No. 96-CRI-07366, slip op. (Ohio Ct. Common Pleas Aug. 18, 1997.)

White then filed a notice of appeal of the trial court's denial of post-conviction relief with the Fifth District Court of Appeals in Ashland County. White raised the following assignments of error for that court's consideration:

I. The trial court erred in failing to review the record of the entire proceeding against Mr. White as mandated by Ohio Rev. Code § § 2953.21(C) and (E).

II. The trial court erred in granting the state's motion to dismiss under Rule Twelve of the Ohio Rules of Civil Procedure.

III. The trial court erred in dismissing appellant's causes of action regarding ineffective assistance of counsel without first granting discovery and an evidentiary hearing in violation of the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, § § 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

IV. The trial court erred in denying Petitioner's motion and dismissing his post-conviction petition without first granting discovery and an evidentiary hearing.

State v. White, No. 97C0A01229, 1998 WL 515944 (Ohio Ct. App. Aug. 7, 1996). On August 7, 1998, the appellate court affirmed the trial court's opinion. *Id.* at *12.

White filed a notice of appeal with the Ohio Supreme Court on September 21, 1998. Concurrent with the notice of

appeal, White filed a memorandum in support of jurisdiction in which he raised the following four propositions of law:

1. It is error for the trial court to fail to review the record of the entire proceeding against a capital petitioner as mandated by the Ohio Revised Code § §2953.21(C) and (E).

2. It is error for a trial court and court of appeals to apply the doctrine of *res judicata* to dismiss claims for relief supported by evidence *dehors* the record.

3. The trial court erred in dismissing appellant's causes of action regarding ineffective assistance of counsel without first granting discovery and an evidentiary hearing.

4. The trial court erred in denying petitioner's motion and dismissing his post-conviction petition without granting discovery and an evidentiary hearing.

(Respondent Ex. 26.) The Ohio Supreme Court declined to exercise jurisdiction and dismissed the appeal *sua sponte*. *State v. White*, 703 N.E.2d. 326 (Table) (Ohio 1998). White filed a motion for reconsideration, but the Ohio Supreme Court denied the motion. *State v. White*, 705 N.E.2d 368 (Table) (Ohio 1999)

White also filed a Motion to Correct the Record so that the record would reflect: (1) a large photograph of Trooper Gross was displayed during trial; (2) Trooper Gross's blood-stained clothing was hung on the witness stand during trial, (3) Prosecutor Francesconi-Rogers placed latex gloves on her hands before touching White's clothing; and, (4) during White's unsworn testimony, members of Gross's family uniformly exited the courtroom. (Respondent Ex. 32.) On March 24, 1997, the trial court held a hearing on this motion. Thereafter, the court denied the motion. Represented by current habeas counsel, Michael Benza and Alan Rossman,

Petitioner also filed an application for reopening in the Ohio Supreme Court pursuant to Supreme Court Practice Rule XI(S) (hereafter "application to reopen" or "*Murnahan* application.") The Ohio Supreme Court, however, denied the application on August 2, 2000. (Doc. No. 120, Ex. B.)

II. HABEAS PROCEEDING

On June 30, 1999, White filed a notice of intent to file a petition for habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 2.) Concurrently, Petitioner filed a Motion to Stay Execution and a Motion to Appoint Counsel. (Doc. Nos. 2, 3.) The Court granted both motions, ordering a stay of execution on July 12, 1999, (Doc. No. 10), and appointing Michael Benta and Alan Rossinan as Petitioner's counsel. (Doc. No. 14.) On September 19, 1999, White filed a Motion for this Court to disqualify itself from this case (Doc. No. 17), which the Court denied. (Doc. No. 22.)

Petitioner then filed eight (8) Motions under seal and ex parte for expert funds. (Doc. Nos. 24, 25, 26, 27, 28, 29, 30, 31, 95.) After Petitioner made several unsuccessful attempts to demonstrate why it was "reasonably necessary" to file these Motions ex parte and under seal, the Court ordered Petitioner to serve Respondent with the Motions, inviting Respondent's opposition. (Doc. No. 99.) Petitioner also filed the Petition for Writ of Habeas Corpus on November 22, 1999, after the Court granted counsel a brief extension of time. (Doc. No. 38.) White set forth twenty-one (21) claims in the Petition, which will be repeated below. Concurrent with the filing of the Petition, White filed a Motion to Stay the Proceeding and Hold it in Abeyance pending the outcome of several United States Supreme Court cases in which that Court had granted certiorari. (Doc. No. 37.) The Court denied the Motion. (Doc. No. 45.) Respondent filed the Return of Writ on January 24, 2000, (Doc. No. 47.)

Petitioner filed a second Motion to Stay the Proceeding and Hold it in Abeyance while Petitioner's counsel returned to state court to file an application to reopen. (Doc. No. 72.) The Court denied this Motion without prejudice. (Doc. No. 106.) Petitioner then filed two Motions to Conduct Discovery and a Motion for an Evidentiary Hearing. (Doc. Nos. 75, 76, 77.) Petitioner next filed the Traverse, (Doc. No. 73), and Respondent thereafter filed a Sur-Reply on March 30, 2000. (Doc. No. 85.) The Court denied Petitioner's discovery and evidentiary hearing Motions. (Doc. Nos. 105, 112.) In addition to the above-listed motions, Petitioner also filed numerous motions pursuant to the Rules Governing Section 2254 Cases 5 and 7, some of which the Court granted. Finally, there are two pending Motions to Reconsider the Court's prior decision to deny discovery as to certain claims. (Doc. Nos. 135, 137.) The Court will address these Motions at the conclusion of this Opinion.

III. GROUNDS FOR RELIEF

Set forth below are the grounds for relief Petitioner asserts in the Petition:

1. Denial of the right to a fair trial, an impartial jury, a reliable sentencing determination and due process of law

2. Prosecutorial misconduct

3. Discriminatory use of peremptory challenges

4. 'Brady' and 'Giglio' claims

5. Ineffective assistance of counsel - culpability phase

6. Ineffective assistance of counsel - mitigation phase

7. Pre-trial publicity and failure to voir dire

8. Failure to properly instruct the jury on the defense of intoxication.

9. Erroneous jury instructions

10. Failure to provide the jury correct, relevant information about parole availability and reliance upon the Petitioner's future dangerousness as an aggravating factor deprived Petitioner of a fair and constitutional sentencing determination

11. Erroneous evaluation of Petitioner's expert psychological testimony relevant to the mitigating factors in Ohio Rev. Code Ann. Section 2929.04(B) under a sanity/competency standard and erroneously rewriting the expert's report before submitting it to the jury

12. The evidence is insufficient to sustain the element of prior calculation and design in relation to the charge of aggravated murder. O.R.C. § 2903.01(A)

13. Erroneous introduction into evidence of gruesome and cumulative photographs and physical evidence

14. The violation of the right to be present at a critical phase of trial

15. Failure of Ohio courts to meet their statutory and constitutional obligation to review due to incomplete record

16. Ineffective assistance of counsel on his direct appeals

17. Improper limitation of Mr. White's right to an appeal

to the Court of Appeals prior to an appeal to the Ohio Supreme Court deprived Mr. White of his due process and equal protection rights

18. Denial of a fair proportionality review as mandated by statute

19. International treaties

20. Electrocution as cruel and unusual punishment

21. Unconstitutionality of the death penalty statute

IV. FACTS

The facts of this case were related by the Ohio Supreme Court in ruling on White's appeal as a matter of right. *State v. White*, 693 N.E.2d 772, 774-776 (Ohio 1998). This Court repeats that factual history here, using the Ohio Supreme Court's language:

This appeal stems from the shooting death of Ohio Highway Patrol Trooper James Gross. Defendant-appellant, Maxwell D. White, Jr., was convicted of aggravated murder with death penalty specifications under R.C. 2929.04(A)(6) (killing a peace officer) and R.C. 2929.04(A)(3) (offense committed for the purpose of escaping detection/ apprehension, trial, or punishment for another offense) . Appellant was also convicted of having a weapon while under a disability, and abduction. The facts leading to this tragic death are as follows.

At around 5:00 p.m., on January 18, 1996, appellant arrived at the condominium he shared with his mother and told her he was taking the night off from his job at the Kroger's warehouse. Appellant left with his pool cue and returned home close to midnight. Appellant was drunk and

asked to be left alone. His mother went upstairs, hoping that appellant would pass out. She confronted appellant when the noise continued, and warned him that someone might call the police if he did not quiet down. Appellant became more agitated and screamed obscenities at his mother. Appellant feared the police because he was on probation for carrying a concealed weapon and believed the police had harassed him in the past and had singled him out. He told his mother that he could not go to jail and that he would rather go to the morgue than go to prison.

His mother went back upstairs to her bedroom, called her daughter, Dorothy ("Dotty"), and told her how appellant was acting. When appellant learned that his mother was on the phone, he pulled all the phones off the wall and told his mother not to call the police.

Appellant then retrieved a gun from the gun cabinet and, after Dotty arrived at the condominium, appellant ordered his mother and sister to pack his duffel bags and fill one bag with his clothes and another with guns from his late father's gun collection. Appellant explained he wanted to live in the woods. He broke the glass to the entertainment center and took out the radio. Appellant used a jump rope to tie his mother and sister to a pole. As appellant fumbled with a clip for the gun he was holding, he fired a shot and wounded his mother just above the right ankle. Appellant left the condominium. Dotty untied herself and her mother and called for help.

In the early morning hours of January 19, 1996, a UPS driver and truck-driving couple who were heading north on I-71 heard CB reports of a brown four-door car driving erratically on the highway. At that time, Trooper Gross was temporarily filling in for the dispatcher (who was on break) at the Ashland post of the State Highway Patrol. At 3:10 a.m., Gross received a CB report regarding the brown car.

Gross left the dispatching area to respond to the call. The truck drivers saw Gross's State Highway Patrol car enter I-71 at milepost 186. They radioed the officer a description of the brown car. As Gross followed the car for about four miles, the driver "straightened up" his driving.

At milepost 190, Gross pulled the car over and reported the license plate to the dispatcher. The dispatcher advised Gross that the car was registered to appellant and that appellant did not have driving privileges. The two truck drivers, Jeffrey and Susan Erickson, saw Gross step out of his vehicle, approach appellant's car and lean toward the driver's side car door to talk to appellant. Mrs. Erickson then saw a flame and heard a pop. Mr. Erickson observed Gross spin around and begin to fall as he tried to run back to the cruiser. Gross slipped and fell. Appellant leaned out of his cracked-open driver's side door and fired shots at the officer's back. Mrs. Erickson heard two more pops and saw two flashes. Her husband testified that the trooper "didn't have a chance" to pull out his weapon in response. Appellant sped away and continued north on I-71.

At approximately 3:15 a.m., the truck drivers radioed on their CB that an officer had been shot. They communicated with another truck driver ahead and told the driver to try to push appellant's car off the road. The truck driver attempted to do this, and forced appellant's car into the median, causing it to fishtail. However, appellant was able to regain control over his vehicle; A high-speed chase ensued, with several different law-enforcement agencies joining in pursuit of appellant at speeds over one hundred miles per hour. Eventually, appellant crashed his vehicle into a concrete drainage culvert near the State Route 18 exit of I-71 northbound. Police apprehended appellant without further incident. From the front floorboard of his car, police retrieved a Smith & Wesson semiautomatic pistol with an empty clip. Appellant was taken to the hospital for injuries he

had sustained, and was later confined to jail.

In the meantime, the UPS driver, who had been following Gross, and a deputy sheriff from the Ashland County Sheriff's Department stopped at milepost 190 and found Gross lying on his stomach directly behind his cruiser. Gross's weapon was in his holster and a flashlight he had carried was lying underneath the cruiser. The sheriff found no pulse and attempted mouth-to-mouth resuscitation and CPR on Gross, with the UPS driver's help. However, they were unsuccessful.

The forensic pathologist who performed the autopsy on Gross testified that Trooper Gross had sustained two gunshot wounds. The gunshot wound to his left arm was consistent with a defensive wound, and resulted in three fractures. The other gunshot wound entered Gross's tight back just below his bullet-proof vest. As a result, Gross sustained multiple perforations of his internal organs, including the right ventricle of his heart, which caused his death. The pathologist testified that, at the most, Gross lived only four minutes after the bullet entered his lower back.

Friends and co-workers of appellant also testified at trial on behalf of the state. Their testimony consistently portrayed appellant as a person who disliked law enforcement officers and felt harassed by them. Following his arrest for carrying a concealed weapon in 1995, appellant told co-workers that he would "cap the ass" of (shoot) the next police officer who stopped him. He also said that "something would happen" if a policeman ever pulled him over again.

The defense rested without calling any witnesses. After deliberation, the jury found appellant guilty as charged.

At the mitigation hearing, several witnesses testified on appellant's behalf, including a clinical psychologist and

chemical-dependency counselor from Interact Behavioral Health Care Services, where appellant had received outpatient services for his alcohol abuse. Co-workers, and family members also testified. Their testimony revealed that appellant grew up on a farm and was above average in his intelligence. He was involved in 4-H and worked at a grocery store iii high school. Over the years, appellant had difficulty in school and with authority figures. As an adult, appellant went into the Navy but received a less than honorable discharge. It was widely acknowledged that appellant had a serious drinking problem and had attended Alcoholics Anonymous meetings and outpatient counseling, but was unsuccessful in his attempt to stop drinking. There was also testimony that his deceased father had been critical of him.

According to the psychologist hired by appellant, appellant suffers from substance dependency (primarily alcohol, but also marijuana) and from dysthymic disorder, a form of depression. He also stated that appellant had a dysfunctional family and that his father was abusive.

Appellant gave an unsworn statement and apologized to Trooper Gross's widow and family. Appellant accepted responsibility for his actions and asked the jury to spare his life.

The state presented several witnesses at the sentencing hearing. Gross's widow and mother expressed their grief over the loss of the decedent. Friends and co-workers described appellant as argumentative and defiant to authority figures at work, but did not characterize him as depressed. One co-worker testified that appellant had threatened him while at work.

After considering this mitigation evidence, the jury recommended that appellant be sentenced to death. The trial court imposed the death sentence for the aggravated murder

of Trooper Gross and sentenced appellant to consecutive prison sentences for his other convictions.

V. STANDARD OF REVIEW

The Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d) (1)-(2)

Before interpreting this statute, this Court must determine whether it is applicable to the instant case. In *Lindh v. Murphy*, 521 U.S. 320 (1997), the United States Supreme Court held that amended § 2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. In *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999), the Sixth Circuit determined that a

habeas case can only be "pending" for purposes of applying the AEDPA once the petition is filed. The court first determined that the word must be given its ordinary meaning. *Id.* at 1038 (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court found that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in §2254 to support its finding. Specifically, § 2254(e) refers to "a proceeding instituted by an application for a writ of habeas corpus." Moreover, section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $150, except that on an application for a writ of habeas corpus the filing fee shall be $5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case may only be "pending" after it commences, or after the filing of the petition. *Id.*

In the instant case, White filed his Petition November 22, 1999, over three years after the AEDPA's effective date. Consequently, the Court will utilize the standard of review set forth in amended 28 U.S.C. § 2254(d).

Recently, the United States Supreme Court interpreted this statute in *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000).[1] According to *Williams*, the phrases "contrary to" and

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[1] This decision supplants the Sixth Circuit's prior interpretations of the statute in *Nevers v. Killinger*, 169 F.3d 352, 361-62 (6th Cir. 1998), *cert. denied*, 527 U.S. 1004

"unreasonable application of" must be given independent meanings. *Id.* at 388. A state court decision can be "contrary to" a Supreme Court decision by one of two means: (1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. *Id.* Because the word "contrary" is commonly understood to mean "diametrically different, opposite in character or nature, or mutually opposed," the Court noted, §2254 "suggests that he state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." *Id.* (citation omitted).

The Court then went on to find that a state court makes an "unreasonable application" of Supreme Court law, and thus a habeas court may grant relief, only if "the state court identifies the correct governing legal rule from this Court's cases, but unreasonably applies it to the facts of the particular state prisoner's case" or if the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 406-7. The Court also determined the "unreasonable application" language to mean something more than merely the state court's incorrect application of federal law. *Id.* at 410-11.

(1999) and *Maurino v. Johnson,* 210 F.3d 638, 643-44 (6th Cir. 2000), *cert.* denied, 531 U.S. 979, 121 S.Ct. 427 (2000). *See Harris v. Stovall,* 212 F.3d 940, 943 (6th Cir. 2000) (holding that "[i]n light of the Supreme Court's decision in *Williams,* we find that *Nevers* and *Maurino* no longer correctly state the law on the issue of the appropriate standard under 28 U.S.C. § 2254 (d).").

The Court noted that a reasonableness review of a state court decision involves an objective, rather than subjective review.

Finally, the *Williams* Court provided guidance on how to interpret "clearly established holdings of the Supreme Court." *Id.* at 379. The Court stated that this statutory phrase "refers to holdings, as opposed to its dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* The *Williams* Court also looked to *Teague v. Lane*, 489 U.S. 288 (1989) and its progeny to help guide federal courts as to what qualifies as "clearly established Federal law." *Williams*, 529 U.S. at 380. The Court opined that "[w]hatever would qualify as an 'old rule' under *Tea*gue will constitute 'clearly established Federal Law, as determined by [this] Court.'" *Id.* (citation omitted). Pursuant to *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States of the Federal Government." 489 U.S. at 301.

VI. EXHAUSTION AND PROCEDURAL DEFAULT

A. EXHAUSTION

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). A federal court will not review a question of federal law decided by a state court if the state court's ruling is based on a state law ground that is independent of the federal question and is adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). This rule applies regardless of whether the state court's decision was based on substantive or procedural issues of law. *Id.*

A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has

been convicted has had a full and fair opportunity to rule on his or her claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990) . If the petitioner still has a remedy in the state courts in which the state court would have the opportunity to rule on the federal constitutional claims in petitioner's case, exhaustion has not occurred. *Rust* v. *Zent*, 17 F.3d at 160.

B. PROCEDURAL DEFAULT

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result bf the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In *Maupin v. Smith*, 735 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim: "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-prong] analysis." *Id.* at 138. Specifically, the Sixth Circuit stated;

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must decide whether the state courts actually

> enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court determines that a state procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

1. The *Perry* Rule

In his Traverse, White contends that any claim Respondent argues is procedurally defaulted on the doctrine of *res judicata* in his post-conviction relief proceeding should be disregarded by this Court. White argues that this doctrine, as applied by the Ohio post-conviction courts, effectively denies a post-conviction relief applicant a review of his or her claims.

This Court, however, bound by Sixth Circuit precedent, must find to the contrary. Ohio Rule of Appellate Procedure 16(A)(3) requires an appellant to include in his or her appellate brief "[a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Ohio R. App. P. 16(A) (3) . In *State v. Perry*, 226 N.E.2d 104 (Ohio 1967), the Ohio Supreme Court ruled that:

> Under the doctrine of *res judicata, a* final judgment of conviction bars the convicted

> defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.

Id. at 108; *see also State v. Roberts*, 437 N.E.2d 598, 601 (Ohio 1982) (holding policy behind *Perry* bars post-conviction petitioners from raising issues that could have been raised on direct appeal in a collateral proceeding to avoid reversal of conviction based on collateral, rather than constitutional, issues). Thus, unless a claim is based on evidence *dehors* (outside of) the record, it must be raised during direct appeal.

The Sixth Circuit has found this rule is an "adequate and independent state ground" pursuant to *Maupin* to bar a merit review of a petitioner's claim for-non-compliance with this rule. *See, e.g., Mapes v. Coyle*, 171 F.3d 408, 420 (6th Cir. 1999), *cert. denied*, 528 U.S. 946 (1999) (noting that the *Perry* rule has been consistently applied); *Brooks v. Edwards*, 96 F.3d 1448 (Table), 1996 WL 506505, at *5 (6th Cir. Sept. 5, 1996) ("The procedural rule [of *res judicata]* applicable to petitioner's claims is an adequate and independent state ground for refusal to hear the claim by the Ohio Supreme Court."). *See also Sweet v. Carter*, 22 F. Supp.2d 707, 716 W.D. Ohio 1998) (finding that petitioner's failure to raise claim on direct appeal constituted waiver of claim because *res judicata* doctrine would bar subsequent review). Consequently, this Court holds that any claim the Ohio courts refused to address based on *Perry* is procedurally defaulted and barred from habeas review.

White next contends that even if this Court finds that Ohio's post-conviction relief proceedings and the

concomitant *Perry* rule generally are adequate and independent state grounds on which to deny federal habeas review, the Court should find that White, specifically, was denied a fair post-conviction review. The Court cannot so find. Other than White's bare assertion, there is no indication that White's post-conviction review offends the federal Constitution. As such, the Court will defer to the state court's procedural default determinations.

2. *Murnahan* Proceeding

White also urges the Court to determine that the proceeding created by *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992) should not bar federal habeas review because the Ohio Supreme Court failed to. address his application. The Ohio legislature created this proceeding to permit a convicted criminal defendant to raise ineffective assistance of appellate counsel. White contends that because the state failed to provide him with counsel to pursue a *Murnahan* application, this remedy is inadequate. White also argues that because the Ohio Supreme Court did not expressly state that it denied White's application because White violated some procedural rule, then this Court should not presume that White violated such a rule. (Doc. No. 120.) Thus, claims White, this Court must review White's *Murnahan*-related claims on the merits. The Court will address each argument in turn.

To support his first argument, White cites the recent Sixth Circuit opinion *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000). In that case, the court determined that because the *Murnahan* proceeding was not part of the state post-conviction or state habeas proceedings, that it must be a continuation of the petitioner's direct appeal. *Id.* at 752. Accordingly, the court reasoned, a defendant seeking to reopen his direct appeal is entitled to effective assistance of counsel pursuant to *Evitts v. Lucey*, 469 U.S. 387, 396

(1965). The court determined that counsel's failure to file a timely application to reopen a direct appeal constituted ineffective assistance of appellate counsel, permitting the petitioner to use that claim as "cause" to excuse procedurally defaulted claims. The court remanded the case to the district court to determine if the petitioner could establish prejudice. White, 201 F.3d 753.

The instant case is easily distinguishable from White. On January 10, 2000, White moved the Ohio Supreme Court to appoint him counsel to file a Rule XI(5) motion to reopen the direct appeal.[2] Although the Ohio Supreme Court eventually denied the application, it did appoint him counsel to pursue this remedy. Moreover, the Ohio Supreme Court did not state that it denied White's application because it was untimely, as was the case in White. Consequently, the Court finds that *White v. Schotten* is inapposite to the instant case as White cannot claim that he was prejudiced by the state court's failure to provide him counsel. Additionally, White asserts in

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[2] That rule, akin to Ohio Rule of Appellate Practice 26(b), permits an applicant to file an application to reopen his or her direct appeal with the Ohio Supreme Court. That rule reads in pertinent part:

Section 5. Application for reopening

(A) An appellant in a death penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed within 90 days from entry of the judgment of the Supreme Court, unless the appellant shows good cause for filing at a later time.

S. Ct. Prac. R. XI(5).

his Traverse that the *Murnahan* proceedings, generally, violate a petitioner's Due Process and Equal Protection rights and that an attorney's conflict of interest may somehow taint a petitioner's application to reopen. The Court declines to address these claims as White offers no proof that he, specifically, was denied these rights. Therefore, these arguments must fail.

White next claims that this Court should not defer to the Ohio Supreme Court's decision to deny his application to reopen because that court did not clearly and expressly state that its denial was based on the violation of a state procedural rule. Thus, White claims, there was no "adequate and independent state ground" on which this Court could find those claims procedurally defaulted. The Supreme Court has determined that "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court way it did because it believed that federal so." *Thompson v. Coleman*, 501 U.S. 722, 733 (quotation marks and citation omitted). The court draws two conclusions from *Thompson*'s holding: First, unless a state court expressly so states, a federal habeas court will presume that the state court did not deny a claim based on a state procedural ground. In this context, a habeas court must presume that the state court decided the case on the merits. Under this presumption, the federal habeas court must address the merits of the petitioner's claims and it also may assume that the state court decision rested, at least in part, on federal law.

In denying White's application to reopen, the Ohio Supreme
Court stated:

> Upon consideration of appellant's application for reopening under S. Ct. Prac. R.

XI, Sec. 5,

> IT IS ORDERED by the Court that the application be, and hereby is, denied.

State v. White, No. 96-2509, slip op. (Ohio Aug. 2, 2000). The court failed to state whether its decision to deny White's application was based on procedural or substantive grounds. As *Coleman* instructs, this Court will presume that the Ohio Supreme Court denied White's application after addressing the merits of his claims. As such, those claims were properly exhausted in state court and are deserving of a merit review here.[3]

3. Cause and Prejudice

White next contends that to the extent the Court finds his claims defaulted despite the above assertions, he can establish cause and prejudice to excuse any procedural default pursuant to *Maupin*. Specifically, White alleges that ineffective assistance of counsel at trial and on appeal can constitute cause sufficient to excuse a habeas petitioner's procedural. default. Before determining if White can properly assert ineffective assistance of trial or appellate counsel as cause to excuse procedural default, the Court first must address the defaulted status of these claims.

The United States Supreme Court recently determined that a petitioner may only use an ineffective assistance of counsel claim to establish cause if that separate ineffective assistance of counsel claim is, in itself, not procedurally defaulted. *Carpenter v. Edwards*, 529 U.S. 446 (2000). Thus, pursuant to *Carpenter*, a habeas petitioner must demonstrate

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[3] The Court's conclusion affects the defaulted status of ground for relief sixteen (ineffective assistance of appellate counsel) only.

either that the distinct ineffective assistance of counsel claim is not procedurally defaulted, or cause and prejudice to excuse the default for that claim. The analysis does not end, however, with the habeas court's determination that the petitioner has not procedurally defaulted his or her ineffective assistance of counsel claim. To be successful in asserting that ineffective assistance of counsel may constitute cause to excuse procedural default, a habeas petitioner first must demonstrate "that [he) received ineffective assistance of . . . counsel that rose to the level of a violation of [his] Sixth Amendment rights." *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000).

Specifically, petitioner must satisfy the two-prong test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 665 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a

court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding, fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

Petitioner asserts the facts on which he bases an ineffective assistance of trial and appellate counsel claim in the fifth, sixth, and sixteenth grounds for relief are sufficient to demonstrate cause and prejudice and he does not provide further factual support when addressing the defaulted status of each claim. Thus, the Court must look to Petitioner's fifth, sixth, and sixteenth grounds for relief to extract a basis on which Petitioner may successfully utilize this claim to excuse his procedural default. The Court finds that White cannot utilize ineffective assistance of counsel as cause to excuse procedural default on two grounds: First, some sub-claims of grounds for relief five and six are themselves procedurally defaulted and White supplies no cause and prejudice to excuse those claims. Second, even if the Court were to find those claims were not defaulted, White cannot establish, as is discussed in detail below, that counsel's behavior was objectively unreasonable and that such behavior resulted in prejudice in the state proceedings. Accordingly, the Court finds that White cannot utilize ineffective assistance of trial or appellate counsel to excuse procedural default.

4. Post-conviction Appeal

Finally, White contends in the Traverse that any claim raised by the Ohio Court of Appeals during a review of his post-conviction relief application warrants a review on the merits. White claims that the Fifth District Court of Appeals addressed the merits of his claims, thus excusing any procedural default pursuant to *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). The Court disagrees with White's interpretation of the Fifth District's opinion. In its opinion, the Fifth District Court of Appeals addressed White's causes

of action but then determined that they were barred from review by *res judicata*.[4] The Court finds that, at most, the Fifth District's opinion represents an alternative holding. The Sixth Circuit has found that an alternative holding does not constitute a waiver of the state procedural bar preventing a habeas court from reviewing the claim. *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir. 2000). Thus, the Court will not address the merits of a claim subjected to that court's review and found procedurally defaulted.

VII. ANALYSIS OF GROUNDS FOR RELIEF

First Ground for Relief - Juror Bias

In his initial ground for relief, White contends that the trial court erroneously permitted several jurors to serve on the jury, prejudicing him thereby: First, White claims that the court unconstitutionally tainted the jury by permitting Susanne Sheppard to sit on the jury. Petitioner claims juror Sheppard's vacillation about her ability to be an impartial juror violated his right to a fair trial. Additionally, White claims that jurors Helen Kerr and Doug Pelton should not

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[4] For example, the court stated in addressing White's proportionality claim:

> The evidence fails to meet a minimum level of cogency to support his cause of action. Therefore, the trial court properly denied appellant a hearing concerning his proportionality claim. Further, this argument is also barred by the doctrine of res judicata as appellant raised this issue on direct appeal to the Ohio Supreme Court.

State v. White, No. 97C0A01229, 1998 WL 5159544, at *7 (Ohio Ct. App. Aug. 7, 1998).

have served on the jury because Kerr was employed by the same hospital in which White was treated and Pelton resided in the same block as Don Ludwig, a court officer who served as a mitigation witness during the sentencing phase. White raised this claim as his first proposition of law to the Ohio Supreme Court. Thus, the Court can address the merits of the claim.

In *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), the Supreme Court invalidated a capital sentence when the trial court excused all jurors who expressed a Conscientious objection to the death penalty. The Court reasoned that the proper inquiry was not whether a prospective juror opposed the death penalty generally, but whether the juror's religious, moral or philosophical beliefs would prevent him or her from following the court's instructions. *Id.* at 514. n.7 ("[E]ven a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the laws of the State.")

The Court revisited this issue after lower court confusion about how to apply the *Witherspoon* standard, determining:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38, 45 (1980); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (affirming

Adams standard) . Given the subjective nature of any such determination, the Court cautioned that "deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

Finally, in *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court reviewed a so-called "reverse *Witherspoon*" case in which the Court determined that a trial court must excuse for cause any juror who would automatically impose the death penalty. The Court noted that its determination was consistent with *Adams* in that it required jurors to follow the law, regardless of what their conscience would dictate. The Court concluded: "Any juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude imposition of the death penalty." *Id.* at 738. Thus, the Court instructed trial courts that, regardless of a juror's personal beliefs, the juror must be able to follow the law to ensure a defendant's right to a fair trial.

In addition to providing trial courts instruction on how to select jury members, the Supreme Court has guided reviewing courts on how to conduct their analyses. In *Gray v. Mississippi*, 481. U.S. 648 (1987), the Court determined that because the right to an impartial jury was so intrinsic to the right to a fair trial, a harmless error analysis could not remedy such a trial defect. *Id.* at 668. Instead of employing a harmless error analysis or permitting the reviewing court to substitute its own decision for that of the trial court, the reviewing court must determine "whether [the trial court's) findings are supported by the record." *Wainwright v. Witt*, 469 U.S. 412, 434 (1985) Thus, a reviewing court must undertake an independent review of the record when determining whether the trial court's decision to include or exclude a juror was proper.

In the instant case, Juror Sheppard initially expressed hesitation when defense attorneys questioned her regarding her ability to be a fair and impartial juror:

Defense Counsel: Are you going to be able to sit for a week, 10 days, two weeks, perhaps three weeks, and keep an open mind and listen to all the evidence that will come forth in this case and then base your verdicts upon the evidence that you hear here in the courtroom and the law that applies to that evidence that Judge Henderson will give to the jury at the conclusion of the evidentiary part of the case?

Juror: To be honest, when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there.

(Voir Dire Tr. at 81.) She also expressed her strong belief in the death penalty. *Id.* at 149. Upon receiving instruction from both the court and counsel that the evidence she was to consider to determine White's guilt would be solely that presented in court, she expressed her desire to follow the law based upon the evidence adduced during trial, stating "I guess I am trying to say I am in favor of [the death penalty] as long as it's proven that it should be given." *Id.* at 151. Juror Sheppard then equivocated, stating that although she did not relish voting for the death penalty, she believed that if one took another's life, the death penalty should be imposed. Consequently, defense counsel questioned her a second time:

Defense Counsel: My question is, are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

Juror: No: I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.

Id. at 160. Thereafter, the trial court overruled defense counsel's challenge for cause.

In his Traverse, Petitioner urges this Court to regard Sheppard's equivocation with misgiving, noting that several of her answers affirming her impartiality were responses to leading questions. This fact, however, is of no avail to Petitioner. As the Supreme Court noted in *Patton v. Yount*, 467 U.S. 1025, 1039 (1984), juror testimony is often times contradictory and ambiguous, particularly in a highly publicized case. In that case, the petitioner sought habeas relief because he asserted that three jurors indicated they previously had formed opinions about his guilt. The Court reiterated the deference to which a habeas court must pay to the trial court regarding a juror's ability to adequately perform his or her duty: "[T]he determination is essentially one of credibility, and therefore largely one of demeanor. As we hate said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'" *Id.* at 1038 (citations omitted)

Similar to the *Patton* jurors, Sheppard expressed some hesitation about her ability to maintain an open mind because of what she heard from the media. Ultimately, however, Sheppard asserted that she could follow the dictates of the law. Thus, adequate support exists in the record to defer to the trial court.

The Ohio Supreme Court cogently analyzed this claim on direct appeal:

> In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause.

State v. White, 693 N.E.2d 772, 777 (Ohio 1998). Because the Ohio Supreme Court's findings are not an unreasonable application of clearly established federal law, this Court will uphold its factual and legal findings.

Finally, White asserts that two other jurors were biased because one worked for the same hospital where White was treated and the other resided near the probation officer who testified for White during the mitigation phase of trial. White does not state beyond mere allegation, however, how these incidental relationships prejudiced him. Therefore, the Court finds White's first claim for relief is without merit.

Second Ground for Relief - Prosecutorial Misconduct

In his second ground for relief, White maintains that the prosecutors violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights as a result of their misconduct. In his Petition, White alleges sixteen instances in which the prosecutor acted inappropriately. White contends the prosecutors violated his due process rights by:

1. improper use of peremptory challenges to exclude women from the jury

2. use of prosecutorial "theatrics" by displaying a photograph of the victim during trial, the method by which the prosecution handled the clothing White wore on the night of the murder, and by displaying Trooper Gross's clothing on the witness stand.

3. use of the word "cap" and mentioning that White's facial hair was different on the night of the murder

4. describing the murder in lengthy and graphic detail even though defense counsel admitted that White was the perpetrator

5. failing to provide defense counsel with a full report of the questions police asked of White

6. improperly impeaching White's mother when she testified

7. improperly commenting on Mrs. White's testimony

8. characterizing an automobile accident in

which White formerly had been involved as a "hit-skip"

9. raising the fact that White had shot his mother in the foot although he was not charged with that crime

10. making inflammatory remarks during closing arguments of the guilt phase that White is a "coward" and "hated police."

11. misstating the law about intoxication and intent to commit murder

12. making improper comments about White's unsworn testimony during mitigation

13. making comments intending to incite the jury against the defendant and feel sympathy towards the victim

14. arguing about defendant's future dangerousness

15. improper use of victim impact evidence

16. telling the jury to disregard Dr. Smith's testimony because he was "paid to find a psychological disorder"

White raised most of these sub-points in his second proposition of law before the Ohio Supreme Court.[5] Thus, the

[5] White's first sub-claim is identical to White's third ground for relief. Rather than repeat its analysis of that claim, the Court will address that sub-claim in its analysis of the third ground later in this Opinion. Additionally, the Court is

Court will address the merits of the claim.

To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, *477* U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

Recently, the Sixth Circuit reaffirmed its prior jurisprudence on prosecutorial misconduct. In *Boyle v. Million*, 201 F.3d 711 (6th Cir. 2000), the court determined that a district court should first determine whether the challenged statements were, in fact, improper, and if *so*, to determine whether the comments were "flagrant," thus requiring reversal. *Id.* at 717. "Flagrancy is determined by an examination of four factors: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of

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unable to discern at what point White raised sub-point fifteen, improper use of victim impact evidence. Because Respondent does not claim this issue is procedurally defaulted, however, the Court will address the merits of this claim.

evidence against the accused." *Id.* (internal quotation marks and citation omitted.)

Although Petitioner attempts to compare this case with the *Boyle* case, in which the Sixth Circuit found prosecutorial misconduct despite the fact that the evidence against Boyle was "relatively straightforward and strong," Boyle, 201 F.3d at 718, that comparison is inapposite. In *Boyle*, there was some discrepancy as to the petitioner's identification. In this case, to the contrary, White's counsel admitted his guilt in their opening argument. Consequently, White is hard pressed to argue the alleged misconduct that occurred during the mitigation phase does not rise to the level of a constitutional violation. The prosecutor's comment that White did not explain his unsworn testimony to the jury and his discussion about White's future dangerousness, even if improper, were, when taken in context of the entire closing argument, sporadic and insufficient to undermine the Court's confidence that he received a fair trial.

The Ohio Supreme Court thoroughly addressed this claim:

> In his second proposition of law, appellant alleges four areas of prosecutorial misconduct: (1) using "prosecutorial theatrics" to receive an emotional response from the jury; (2) presenting graphic details of the shooting and using irrelevant evidence to portray appellant as a bad person; (3) during the guilt phase closing arguments, mating several inflammatory and derogatory remarks about appellant, commenting on the nature and circumstances of the crime, and expressing opinions about his character;; and (4) during the penalty phase closing arguments, improperly remarking about appellant's unsworn statement

and evoking sympathy' from the jury when arguing for the death penalty.

The test for prosecutorial misconduct in closing argument is whether the remarks were improper, and, if so, whether they prejudicially affected substantial rights of the accused. State v. Smith (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 318, 470 N.E.2d 883, 885. Since defense counsel failed to object to the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error. State v. Slagle (1992), 65 Ohio St.3d 597, 604, 605 N.E.2d 916, 925. We will review these allegations under the plain error standard.

Under the heading of "prosecutorial theatrics," appellant points to the following and alleges error: displaying a large photograph of Trooper Gross in uniform, on an easel, in full view of the jury; handling Trooper Gross's blood soaked and tattered uniform on the witness stand; and demonstrating disgust toward appellant by using latex gloves to handle appellant's clothing. None of these examples is reflected in the transcript, and, according to appellant, the trial court overruled appellant's motion to correct the record. Under this heading, we find no plain error.

We also find no plain error with the way in which the prosecutor had witnesses describe their attempts to revive Trooper Gross. The witnesses' testimony, even when graphic, was relevant to describing the murder and its aftermath. The fact that an emotional response was elicited by one witness (who said, "Hang on buddy" as he tried to revive the trooper) does not show prosecutorial misconduct. Nor was it improper to have a witness state that the term

"cap" was used by gang members. The witness wa5 defining the term as used by appellant, and it is proper for the witness to explain how he was familiar with it. The testimony was relevant, and the term "cap" needed to be defined. As to allegations that the prosecutor appealed to the jurors' sympathy by referring to the way Trooper Gross looked before and after his death and by commenting on appellant's "grim reaper" tattoo and longer hair and goatee, none of these alleged acts of misconduct individually or collectively was outcome-determinative. State v. Long (1978), 53 Ohio St.2d 91, 96-97, 7 O.O.3d 178, 181, 372 N.E.2d 804, 807-808.

Appellant also alleges that the prosecutor made misstatements about his character during the guilt phase closing argument. For instance, appellant states that it was improper for the prosecutor to say that appellant "hated" the police and to call him a "coward." He also says it was prejudicial for the prosecutor to comment on his lack of expression when his mother testified. Again, under a plain-error analysis, we find no error requiring reversal. The evidence shows that appellant strongly disliked the police. Therefore, the prosecutor's statement that appellant hated the police was within acceptable latitude. Furthermore, calling appellant a coward is consistent with the evidence that appellant shot the trooper in the back. This remark is tame compared to comments we have allowed describing other defendants in capital cases. See, e.g., State v. Brown (1988), 38 Ohio St.3d 305, 316-317, 528 N.E.2d 523, 528 (where defendant was called a monster); State v. Beuke

(1988), 38 Ohio St.3d 29, 33, 526 N.E.2d 280 (where defendant was referred to as a cancer requiring removal).

Finally, appellant argues that the prosecutor made impermissible comments on appellant's unsworn statement during the sentencing phase closing argument. In State v. DePew (1988), 38 Ohio St.3d 275, 285, 528 N.E.2d 542, 554, we stated that a prosecutor's comment on the lack of an oath or affirmation should be limited to pointing out that the defendant's statement has not been made under oath or affirmation. In this case, the prosecutor said to the jury, "[W]hen [the appellant] gave his unsworn testimony, he did not give you the respect of explaining it to you." Even if this comment went beyond the permissible limits set forth in DePew, we find that this remark does not rise to plain error, given the weight of the aggravating circumstances in relation to the mitigating factors. State v. Lorraine (1993), 66 Ohio St.3d 414, 419, 613 N.E.2d 212, 218. Other remarks, even those used to evoke passion (for example, that the appellant "tore the heart out of a family"), were also within the permissible scope of closing argument. We have previously held that both parties are entitled to wide latitude during closing arguments. State v. Brown (1988), 38 Ohio St.3d 305, 317, 528 N.E.2d 523, 538. We find no plain error in any of the statements cited.

State v. White, 693 N.E.2d 772, 778-79.

The Ohio Supreme Court's reasoning is not contrary to United States Supreme Court precedent. Consequently, the Court finds White's second ground for relief is not well-

taken.

Third Ground for Relief - Discriminatory Peremptory Challenges

In ground for relief three, White asserts that the state unconstitutionally excluded women from the jury. Respondent counters that the Court cannot address this claim as White neither raised this claim during direct appeal or in his post-conviction petition. White later raised this issue in his application for reopening his direct appeal pursuant to Supreme Court Practice Rule XI (5) . That court denied that application without opinion.[6] Because Ohio has a contemporaneous objection rule[7] and White's counsel failed to object to the state's use of peremptory challenges during voir dire, it would appear this claim is procedurally defaulted.

White, however, asserts otherwise. Instead, White proffers three grounds on which this Court can find this claim ripe for a merit review. White first claims that Ohio's contemporaneous objection rule and concomitant plain error analysis is not an adequate and independent state ground. He

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[6] As stated above, the Court's decision reads:

> "On application for reopening under S .Ct. Prac. R. XI(5). Application denied." *State v. White*, 732 N.E. 2d 999 (Table) (Ohio 2000).

[7] Ohio Rule of Criminal Procedure 52(8) states:

> (B) Plain error
>
> Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

next asserts that procedural default may be excused because ineffective assistance of counsel provides "cause" necessary to excuse the default. Alternatively, White asserts that appellate counsel's failure to file an application to reopen his appeal constitutes "cause" to excuse his default. The Court will address each argument in turn.

A. Contemporary Objection and Plain Error Analysis

In his Traverse, White acknowledges that Ohio courts have determined that a failure to contemporaneously object to an alleged error constitutes procedural default. Traverse at 70 (citing *State v. Williams*, 304 N.E.2d 1364 (Ohio 1977)). If a defendant fails to object to a trial error that would affect a substantial right, then the appellate courts will conduct a plain error analysis of that claim. *State v. Slagle*, 605 N.E.2d 916, 925 (Ohio 1992). White next suggests that because plain error review is grounded in the *federal* due process concept of a fundamentally fair trial, it fails the third prong of the *Maupin* test outlined above, i.e., that a habeas court may review the merits of a claim because the state finding of procedural default is not based on a ruling independent of federal law. As such, White concludes, this Court need not show deference to Ohio's contemporaneous objection rule and the plain error analysis it implicates.

Although the support on which White based this argument was seriously questioned in a recent Sixth Circuit opinion,[8] the Court need not address White's argument here.

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[8] White cites *Knuckles v. Rogers,* 983 F.2d 1067 (Table), 1993 WL 11874 (6th Cir. Jan. 21, 1993) to support his opinion. The Sixth Circuit questioned the precedential effect of that case in *Scott v. Mitchell,* 809 F.3d 854 (6th Cir. 2000) In *Scott,* the court determined that a district court erred in holding that *Knuckles* dictated a finding that Ohio's contemporaneous objection rule was not an independent state

In his argument, White fails to address one overarching fact; no Ohio court conducted a plain error analysis on this issue because appellate counsel never raised this claim in state court. Although White's habeas counsel attempted to raise this issue in his application to reopen, that fact is of no avail. Whether appellate counsel was ineffective for failing to raise this issue is irrelevant to the analysis here. The fact that White neither objected to the venire during trial nor raised that issue on direct appeal resulted in White's waiver regarding its composition. Whether he can excuse this waiver is a distinct issue the Court will address below.

B. Ineffective assistance of appellate counsel as "cause" to excuse procedural default

White cannot substantiate his ineffective assistance of appellate counsel claim pursuant to the two-prong *Strickland* analysis. See ground for relief sixteen, *infra.* Therefore, he cannot utilize ineffective assistance of appellate counsel as cause to overcome procedural default.

C. Failure of Post-conviction Counsel to Raise this claim in a *Murnahan* proceeding constitutes "cause" to excuse procedural default

The Court addressed this issue in Section VI., B.., 2, *supra.* There the Court noted that White applied for and received counsel to pursue a *Murnahan* application. Thus, White cannot argue post-conviction relief counsel's ineffectiveness because he eventually received counsel who raised these issues. Moreover, the Court has determined that White's *Murnahan* claims are not procedurally defaulted as the Ohio Supreme Court did not expressly so state. Hence, White cannot argue that he was prejudiced by the Ohio Supreme Court's delay in appointing counsel. As such,

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ground. *Id.* at 866.

White cannot use post-conviction counsel's failure to raise this claim in a *Murnahan* proceeding as cause to excuse procedural default.

Because the Court finds that White has waived this claim when he failed to raise it in state court and cannot demonstrate cause and prejudice to excuse the waiver, the Court finds this claim is procedurally defaulted.

Were the Court to address this claim on the merits, it would not be well-taken. Before a party facing a gender-discrimination challenge is required to explain a reason for that challenge, the party alleging gender discrimination must make a prima facie case of intentional discrimination. *J.E.B. v. Alabama*, 511 U.S. 127, 144 (1994) . If the alleging party succeeds in demonstrating a prima facie case, the opposing party must then explain a gender-neutral reason for exercising its peremptory challenges. "When an explanation is required, it need not rise to the level of a 'for cause' challenge; rather, it merely must be based on a juror characteristic other than gender . . . ." *Id.* (citation omitted).

In the instant case, White could arguably make a prima facie peremptory challenges to excuse seven women and one man. In its response to White's application to re-open, however, the state explained its reasons for excusing four of the seven prospective jurors:

> Although the population is about evenly divided between men and women, the pool in the instant case appears to have had many more women than men. Of the jurors questioned whose sex can be determined from the record, there were approximately 57 women and 36 men. The prosecution excused 7 women and one man; Appellant excused 5 women and 3 men. Nothing about the instant case suggests a motive

to discriminate against women.

> Appellate counsel would have been unable to show plain error because the prosecutor's peremptory challenges were obviously related to the excused jurors' opinions on the death penalty. For example, the prosecutor excused Ms. McConnell, who said she could not sign a death penalty verdict. (T., 195); Mrs. Daniels, who said that other penalties would be just as effective as the death penalty. (T., 262,.297); Mrs. Nixon, who said she had doubts about the-wisdom of the state's having a death penalty (T., 229); and Mrs. Ross, who said she would feel better if Ohio had no death penalty and that "two wrongs don't make a right." (T., 184, 188). The inference appellant attempts to draw from statistics is, in this case, too weak to establish even a prima facie case.

State's Response to Defendant's Application to Reopen at 4-5, *State v. White*, No. 96-2509, slip op. (Ohio Aug. 2, 2000) (entry denying appellant's application for reopening under S. Ct. Prac. R. XI, Sec. 5).

The Court agrees with the state's conclusion. Upon explaining that four of the seven women were excused because of their views on the death penalty, White cannot assert a third ground for relief has no merit.

Fourth Ground for Relief - *Brady* and *Giglio* Claims

In this ground for relief, White contends that the prosecution either withheld pertinent evidence or misled the jury regarding such evidence during trial. Specifically, White argues that the state withheld or misled the jury in the following eight instances:

1. The prosecution introduced evidence that White's blood alcohol test indicating that he exceeded the legal limit for intoxication was taken at 5:10 a.m. when, according to hospital records, it was actually taken at 6:25 a.m. or later.

2. Dorothy White's statements regarding White's intoxication were not made available to defense counsel.

3. Photographs of Jean White's kitchen taken before Dorothy White cleaned it depicting broken glass and White's unsuccessful attempts to prepare food were not provided to defense counsel.

4. The prosecution misled the jury by arguing that unless an individual is unconscious, he or she is able to form criminal intent.

5. The prosecution misled the jury when it suggested that the jury was taking a "leap of faith" in assuming that White would not be dangerous in the future.

6. The prosecution forbade White's fellow inmates from speaking about White's conduct and prevented Don Ludwig, the court officer who conducted the presentence investigation from placing references regarding White's conduct in his report.

7. The prosecution raised the issue of White shooting his mother in the foot even though this charge was dismissed.

> 8. The prosecution raised the issue of White tying up his mother and sister with a rope although there was evidence that White was merely "playing a game."

Of these eight instances to which White refers, numbers 4, 5, 7, and B were raised in White's second ground for relief, *supra*. The Court will not readdress those arguments here.

The Court subjects the remaining four instances that White cites to a procedural default analysis. Respondent merely recites that White "did not raise this claim on direct appeal; however, this claim was raised as part of [White's] first claim in his petition for postconviction relief." Return at 52. What Respondent fails to note, however, is that the post-conviction court summarily concluded that claim one was barred from review on *res judicata* grounds. *State v. White*, No. 96-CRI-07366, slip op., at 3 (Ashland Court of Common Pleas Aug. 18, 1997). The appellate opinion does little to enlighten this Court on the bases for its decision as it concluded, "Our review of the [ ] exhibits establish[es] that these materials are not materials outside the original record which would support appellant's claim for relief or do not meet a minimum level of cogency to support the claim of prosecutorial misconduct." *State v. White*, No. 96CR1017366, slip op., 1998 Ohio App. LEXIS, at *6 (Ohio App. Ct. Aug. 7, 1998).

White contends that because *Brady* claims necessarily derive from materials *de hors* the record, the appellate court's decision is an unreasonable application of law, requiring this Court to dispense with deference to its finding. As stated above, the AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The above-cited law, however, does little to direct the Court on the course it must

take when a state court issues a summary opinion. The Court must now look to the modest amount of case law since the AEDPA's enactment for guidance.

Initially, the Court notes that the Ohio Court of Appeals's opinion, while brief, was an "adjudication on the merits" pursuant to § 2254 (d). Courts deciding habeas cases involving a state court's summary review have determined that a summary review is not "indicative of a cursory or haphazard review of a petitioner's claims." *Wright v. Angelone*, 151 F3d 151, 157 (4th Cir. 1998).

The Sixth Circuit recently has held that in instances where a state court issues a summary opinion, a reviewing court should conduct an independent review of the record to determine whether the state court clearly erred in its application of federal law. See *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000) (following Tenth Circuit which previously stated in *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999), that a habeas court must uphold the state court's summary decision unless the court's independent review of the record reveals that the state court unreasonably applied the law or facts in the case). In that case, the Michigan Court of Appeals summarily issued an order granting the State's motion to affirm the conviction on appeal. *Id.* The Michigan Supreme Court denied the petitioner leave to appeal the Court of Appeals' decision. *Id.*

After reviewing the standard of review other circuits found applicable in the face of a state court summary decision, the Sixth Circuit determined that it would conduct an independent review of the petitioner's habeas claims. It went on to note; "[t]hat independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* The court then applied the two-step approach of conducting

an independent review, then subjecting the state court holding to the "reasonableness" review that the AEDPA mandates.

Thus, if a habeas court determines that a petitioner has not demonstrated a constitutional violation in a particular claim, then it must necessarily determine that a state court decision denying such a claim was not "unreasonable." If it determines that the petitioner's claim has merit and a constitutional violation occurred, then the habeas court must defer to the state court decision unless it was "unreasonable" pursuant to the statute. This Court will, thus, subject White's fourth ground for relief to an independent review. Thereafter, the Court will determine if the state court holding was "reasonable."

To establish a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000) (citing *Moore* v. *Illinois*, 408 U.S. 786, 794-95 (1972)). "The inquiry is objective, independent of the intent of the prosecutors." *Id.* (citing *Brady*, 373 U.S. at 87.).

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome of the proceeding." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985). There is no *Brady* violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th

Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (citation and internal quotation marks omitted).

Recently, the Supreme Court expounded on the prejudice or "reasonable probability" prong of *Brady*. In *Strickler v. Greene*, 527 U.S. 263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of *Brady* by failing to provide exculpatory information to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of the petitioner's abduction of the victim and how she was able to remember such detail. *Id.* at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. *Id.* at 296.

Conversely, the Court held in *Giglio v. United* States, 405 U.S. 150 (1972), that the government's failure to disclose a plea agreement with its prime witness against the defendant could not withstand a Brady review. There, the Court determined that the testimony of a witness who indicated during trial testimony that he did not have a plea arrangement with the government was material. The Court determined that evidence regarding an agreement with the government was relevant to the witness's credibility and, consequently, the jury was entitled to hear it. *Id.* at 155. The Court held that *Brady* dictated reversal. Subjecting Petitioner's four remaining claims to a *Brady* analysis, the Court finds they cannot withstand such scrutiny. In the first

claim, White contends that the state erroneously introduced evidence that White was not intoxicated six and a half hours after he had taken his last drink. Specifically, White contends that the state offered testimony that White's blood alcohol level was tested at 5:10 a.m. rather than the 6:25 a.m. time in the hospital records.[9] Moreover, White asserts, his intoxication was still apparent at 8:00 a.m., when he was admitted to jail. This misrepresentation, White asserts, violates the *Brady* and *Giglio* holdings.

The Court disagrees. White's assertion cannot withstand even the first prong of the *Brady* test. The hospital records that indicated the time that White's blood was drawn for analysis were not solely within the state's control. Indeed, because they were White's medical records, it presumably would have been as easy for White to obtain such records as for the prosecution. Thus, the Court cannot determine that the prosecution "withheld" pertinent information from White. Additionally, to the extent White is attempting to assert that, pursuant to *Giglia*, the prosecution misled the jury by misstating the time at which White submitted to the test, the Court finds that the one hour and fifteen minute difference in the test times was not a material misstatement. The Court is confident that, had the testimony depicted the 6:25 time of the blood draw, the jury would have reached the same verdict. Therefore, the Court finds no merit in this claim.

In White's second *Brady* claim, he argues that the state withheld Dorothy White's statement to police. Once again, the Court finds that this information was not within the state's exclusive control. Dorothy White must have recalled the essence of her conversation with the police regarding her

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[9] During trial, state police trooper Sergeant Monte Morgan testified that White's blood was drawn at 5:10 a.m. (Trial Tr. at 800.)

brother's intoxication. Moreover, White does not articulate how the state's failure to provide this statement prejudiced him. Finally, there was ample evidence, such as medical evidence, adduced during trial of White's intoxication. Dorothy White's statement would have been cumulative. Thus, the claim has no merit.

White next contends that photographs the police took of White's kitchen depicting broken glass and food "everywhere" were never provided to defense counsel. As with the above two claims, the court finds that this information would have been of marginal benefit to the defense. The state introduced evidence that White's blood alcohol level exceeded the legal limit at 5:10 a.m. Clearly the jury could infer that in the hours prior to the blood alcohol test White's blood alcohol level would have been further elevated. Thus, even if these pictures could have aided White in proving his own intoxication-and the Court explicitly does not so find- they would have been cumulative. Because these photos were not material to the jury's verdict, the Court finds the state's failure to provide defense counsel with these photographs was not a *Brady* violation.

Finally, White claims that the state violated *Brady* by forbidding his fellow inmates from speaking about his model prison behavior before and during trial. It is unclear, however, how White obtained this information. In his Petition, White states: "When Dorothy White suggested to the press that they might obtain [information regarding White's prison behavior] from jailers, after the trial of this case was over, she learned that the prosecutors expressly forbade jailers from discussing Max's behavior while in jail. Petition at 39. Disregarding the dubious origins of this statement, the Court finds that this information does not fall within *Brady's* purview. Petitioner does not state anywhere in his brief that defense counsel or other personnel linked to his defense attempted to speak with inmates incarcerated

with Petitioner. Thus, Petitioner is hard pressed to assert that the state "withheld" this information. Moreover, the records from the Ashland County jail that White states demonstrates his model behavior are accessible to the public. Petitioner does not assert that he was denied access to these records. Thus, Petitioner cannot pass the initial *Brady* prong. Because White cannot establish that the prosecution withheld evidence material to his defense, the Court finds White's fourth ground for relief is not well-taken. The Ohio Supreme Court was not unreasonable in denying this claim.

Fifth and Sixth Grounds for Relief -
Ineffective Assistance of Trial Counsel

As stated above in section VI., B., 2, *supra*, to successfully assert an ineffective' assistance of counsel claim, a petitioner must satisfy the two-prong test for ineffective assistance of counsel. set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

A petitioner must point to specific errors in counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Id.* at 689. To ascertain

whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 3641 372 (1993). Mindful of the above law, the Court now addresses White's individual ineffective assistance of counsel claims.

1. Fifth Ground for Relief

In his fifth ground for relief, White argues that defense counsel committed numerous errors during the culpability phase of trial. He contends that these errors, when viewed both individually and cumulatively denied White his right to effective assistance of counsel pursuant to the Sixth Amendment.

Although White presents his allegations of misconduct under six separate headings in his Petition, these headings contain numerous sub-points. Before addressing the merits of White's many sub-points, the Court first must address whether he has procedurally defaulted these claims. The Court will conduct its analysis in the order that White raised his claims in the Petition.

A. Failure to File Notion to Suppress

Under this heading, Petitioner claims that counsel were constitutionally ineffective for failing to file a motion to suppress firearms obtained during a search of White's automobile. Although a search warrant was not filed with the Medina County Common Pleas Court until 3:31 p.m. on January 19, 1996, an inventory of the search warrant indicates that police officers conducted a search of his automobile at 1:00 p.m. on that day. White claims the fruits

of this search, i.e., the firearms, were prejudicial. Defense counsel could have avoided the introduction of these items, White argues, had they filed a motion to suppress the evidence for failure to conduct a timely automobile search.

The Court finds that this claim is procedurally defaulted. Petitioner first raised this claim during post-conviction relief proceedings. On appeal, the Fifth District Court of Appeals noted that these claims are barred by *res judicata* because they could have been raised on direct appeal to the Ohio Supreme Court. *State v. White*, No. 97COA01229. 1998 WL 515944, at *10 (Ohio Ct. App. Aug. 7, 1998). Thus, the Court need not address the merits of this claim.

Out of an abundance of caution, however, the Court finds that even if this claim were ripe for a merit review, it would not be well-taken. Fourth Amendment search and seizure claims are generally not cognizable in federal habeas proceedings. In *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court found that the exclusionary rule created in *Mapp v. Ohio*, 367 U.S. 643 (1961) is not a personal constitutional right but a judicial rule created for its deterrent effect. Therefore, the Court reasoned, it would be of little value to enforce it on collateral review. *Id.* at 486. The Supreme Court limited the scope of *Stone's* Fourth Amendment claim prohibition, however, in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). There, the Court determined that the prohibition against asserting Fourth Amendment claims in a habeas proceeding does not preclude a petitioner from asserting a Sixth Amendment ineffective assistance of counsel claim for failing to raise such a claim in state court. Similarly, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court determined that a petitioner may assert a Fourteenth Amendment due process claim even if that claim is based on a search and seizure issue. Thus, White may raise a Fourth Amendment claim in an ineffective assistance of counsel context.

The Court finds, however, that White's claim has no merit. White cannot show that he was prejudiced by the admission of the firearms evidence during trial. As the Ohio Supreme Court noted, there was overwhelming evidence supporting White's conviction. Specifically, several eyewitnesses identified White as the individual whom Trooper Gross pulled over for driving erratically. Moreover, the license plate that Trooper Gross identified on the car he had pulled over belonged to White. Finally, other individuals testified that they witnessed what appeared to be White shooting the Trooper. Given this deluge of evidence supporting White's guilt, the Court finds that the admission of the firearms contained in White's automobile does not undermine the Court's confidence in White's conviction. White cannot successfully claim, consequently, that his counsel were ineffective for failing to raise this issue.

B. Ineffective Assistance During Voir Dire

In this group of sub-claims, White claimed counsel acted ineffectively during voir dire. Specifically, White contends that counsel were ineffective for failing to: (1) object to the prosecution's use of peremptory challenges against six female jurors; (2) object to Juror Kathy Howman, who admitted she had discussed the case with her family; (3) object to Juror Sheppard; (4) object to Juror Pelton; (5) object to Juror Kerr; (6) request a change of venue; (7) inquire about the jurors' views on substance abuse as a mitigating factor; (8) object to the court's unilateral decision to excuse six venire members; and, (9) object to the court's removal of Juror Dorothy Schade because of her age.

With the exception of sub-point seven, all other sub-points are addressed as discrete claims elsewhere in this Opinion. See grounds for relief one and three, *supra* and ground for relief seven, *infra*. Because the Court finds that

those discrete claims have no merit, it necessarily must find that White cannot establish counsel's failures prejudiced the proceeding pursuant to *Strickland.* The Court need not determine whether counsel's actions were objectively unreasonable for those claims, as a habeas petitioner must establish both prongs of the *Strickland* test to succeed on an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 697. Consequently, sub-claims one, two, three, four, five, six, eight, and lime are without merit.

In sub-claim seven, White complains that his counsel did not adequately inquire about the venire members' views regarding substance abuse as a mitigating factor. White raised this sub- claim as part of his ninth proposition of law to the Ohio Supreme Court. Accordingly, the Court can address it on its merits.

During voir dire, trial counsel did not question jurors individually about their views on substance abuse but generally stated that the effects of alcohol "may be considered as to how it affects a person's emotional status and his ability to form intents and purposes and so forth. Any of you have any problem with that?" Petition at 45. Petitioner now asserts that defense counsel should have been more proactive in determining the jurors' opinions regarding substance abuse. Rather than addressing one question to the entire venire, Petitioner Claims that counsel's performance fell short of professional because counsel "did not discover enough about the jurors' attitudes to ascertain whether their personal biases would prevent them from considering the effects of intoxication as a mitigating factor." *Id.*

The Court finds that counsel's general failure to question each juror individually regarding their views on alcohol as a mitigating factor is not objectively unreasonable. While defense counsel certainly could have questioned venire members regarding their views on alcohol more extensively,

counsel's decision to pose a general question to the venire does not render their assistance ineffective. Counsel's performance in this instance was not "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Therefore, this sub-point has no merit.

C. Use of Prior Bad Act Evidence

In this sub-section, White argues that counsel were ineffective for either raising or failing to object to the prosecutor's raising prior instances of White's misconduct. White cited five instances in which he believed counsel's failure fell below professional standards: (1) requesting the pre-sentence report; (2) the cross-examination of state witness Brian Brooks and Chad McGuirk; (3) failing to object to the state's introduction of a "hit-skip" accident; (4) failing to object to the prosecution's use of carrying a concealed weapon charge as an aggravating circumstance; and, (5) failing to object to the scope of probation officer David Hobson's testimony concerning White's prior criminal record. Sub-claims number three and four were addressed as discrete claims in grounds for relief two and four, *supra*. The Court will not re-address them here.

The Court finds that the remaining sub-claims are not procedurally defaulted. Sub-claims one, two, and five were raised on direct appeal to the Ohio Supreme Court in White's ninth proposition of law. Consequently, the Court will address each sub-claim on the merits.

In the first sub-claim, White asserts that defense counsel were ineffective for requesting the pre-sentence report. White does not elaborate, however, on how this report prejudiced him. As stated above, to successfully demonstrate counsel's ineffectiveness, a petitioner must point to specific errors in counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Without stipulating what prejudicial

information was contained within the pre-sentence report, the Court cannot find that counsel was ineffective for requesting it. Furthermore, if trial counsel had not requested the pre-sentence report, Petitioner White would now be claiming that as an error. Consequently, this sub-claim is without merit.

In sub-claim two, White alleges counsel's ineffectiveness during the cross-examination of two state witnesses. Brian Brooks, one of White's co-workers, testified that White showed great interest in guns and that White had displayed a semiautomatic gun, the same type used to kill Trooper Gross, his home on a prior occasion. (Trial Tr. at 1067-68.) White takes issue with the fact that on cross-examination, White's counsel elicited the following information:

Counsel: Was that an obsession with Max White [guns were] all he talked about, [], or would it come up in a line of conversation with fellow employees like-yourself?

Brooks: Most of the time when I heard him talk about guns was threats.

Counsel: Threats?

Brooks: Yeah.

Counsel: Did he ever threaten you?

Brooks: Yes.

(Trial Tr. at 1073.) What White does not report in his Petition, however, is that upon counsel's further questioning, Brooks admitted the threat came after the two were "teasing each other" (Trial Tr. at 1073) and that he never reported the incident to anyone. (Trial Tr. at 1074.) Moreover, counsel

also questioned whether Brooks maintained a friendship with White after that incident. Brooks responded affirmatively. (Trial Tr. at 1079.)

Similarly, White argues that defense counsel elicited damaging and prejudicial-testimony from Chad McGuirk, another coworker of White's. McGuirk was present when White threatened Brooks with the semiautomatic weapon. The prosecution raised this issue on direct examination, in which McGuirk largely corroborated the events about which Brooks had testified. During cross-examination, defense counsel elicited the following testimony:

Counsel: Mr. McGuirk, if I understood correctly, you said now that Max told Mr. Bropks that he was going to tell him before or he told him that he was going to kill him before he got the gun?

McCuirk: As he was going to get the gun, he told him that he would -- he wouldn't fight him. He'd shoot his ass.

Counsel: Just shoot his ass?

McGuirk: That's how he stated.

(Trial Tr. at 1087.) Defense counsel went further, however, asking whether White actually did any shooting. McGuirk replied negatively and the cross-examination concluded.

The Court finds that defense counsel's cross-examination of these two witnesses does not constitute ineffective assistance of counsel. When taken in context of the entire trial, these testimony. The Ohio Supreme Court cogently analyzed this claim:

> Appellant claims that his trial attorneys were defective because they elicited and allowed testimony regarding his past bad acts. For instance, during the cross-examination of his co-workers, appellant points out that defense counsel elicited responses that appellant had threatened one of them with a gun. The jury had already heard critical evidence that appellant had threatened to shoot the next police officer that stopped him, evidence used to show prior calculation and design. Defense counsel was apparently trying to lessen the blow of this evidence by showing that although appellant had threatened a co-worker, nothing had come of it and that the witnesses and appellant remained friends. Defense counsel later argued that the threat to police officers was an idle threat, and not evidence of prior calculation and design. This defense strategy was sound and did not amount to ineffective assistance of counsel.

State v. White, 693 N.E.2d at 779-80. Because the Court finds that the Ohio Supreme Court did not unreasonably apply the *Strickland* test, this sub-claim is without merit-indeed, it is utterly merit less.

In sub-claim five, White argues that counsel were ineffective for failing to object to the scope of probation officer David Hobson's testimony concerning White's prior criminal record and misconduct. As with sub-claim one, White fails to elaborate on how this testimony prejudiced him. The state called Hobson to testify about the terms of White's probation and White's state of mind after learning he might face further consequences as a result of an Operating a Motor Vehicle while Intoxicated (hereinafter "OMVI") conviction. This conversation took place the day before the murder and presumably demonstrated that White was

agitated with law enforcement officials and formed a premeditated intent to kill. Any objections on the part of White's counsel to exclude this testimony would have been overruled. Hobson needed to refer to the conviction to explain what occurred during their January 18, 1996 meeting. Counsel were not ineffective for failing to object to that portion of Hobson's testimony.

This sub-claim is not well-taken.

D. Failure to Investigate

Under this sub-heading White alleges defense counsel's ineffectiveness for failing to investigate White's level of intoxication when he shot his mother and the correct time White's blood was drawn for evaluation. Additionally, White contends his counsel should have raised the issue that although White is left handed, police investigative reports indicate that White shot his firearm with his right hand. Finally, White argues defense counsel were ineffective for failing to raise the issue that the searchlights from Trooper Gross' vehicle may have obscured White's vision while shooting.

Initially, the Court analyzes the defaulted status of these claims. White raised them during post-conviction proceedings in his seventh cause of action. On appeal, the Fifth District Court of Appeals found these claims barred by *res judicata* as they could have been raised on direct appeal. *State v. White*, No. 98C0A01229, 1998 WL 515944, at *10. Thus, these claims ate procedurally defaulted and the Court need not address their merits.

Even if these claims were not defaulted, however, they would be without merit. Counsel's alleged failure to investigate White's blood alcohol level was largely addressed in the fourth ground for relief, *supra*, at 53. The Court

determined in that claim that the minimal discrepancy between the time White's blood alcohol level was tested and the time Officer Morgan testified it was taken is immaterial. Furthermore, counsel presented extensive evidence of White's intoxication during trial. Thus, counsel were not ineffective for failing to investigate his blood alcohol level when he accidentally shot his mother.

Similarly, counsel's failure to raise the issues of which hand White shot the weapon with and whether his view was obscured are inconsequential. One could infer that because White discharged his weapon in the area in which he believed Trooper Gross would be standing White intended to kill him. Whether his view was obscured by the searchlights is irrelevant. Whether White shot the officer with his right or left hand is also inconsequential. Counsel's strategy, likely the only one available to them, was to admit that White shot Trooper Gross but to plead intoxication. White's counsel adequately performed this task. These claims are so totally lacking in merit as to be insulting to the Court and to the administration of justice. These claims must fail.

E. Other Acts

Under this sub-heading, White contends that counsel rendered ineffective assistance in eleven instances: (1) defense counsel admitted to White's guilt in abducting Jean White; (2) defense counsel failed to object to Trooper Gross' widow and mother sitting together in the courtroom even though the judge had imposed a separation of witness order; (3) counsel failed to preserve the videotape footage 61 the trial in a timely fashion; (4) counsel failed to obtain signatures on a withdrawal of his motion to enter a plea of not guilty by reason of insanity; (5) failure to object to hearsay evidence; (6) failure to object to the admission of the tape recording of Jean White's statement into evidence; (7) failure to object to "prejudicial demonstrative evidence" and

the prosecutors' "courtroom theatrics"; (8) failure to object to autopsy photographs admitted into evidence; (9) failure to object to the admission of photographs taken of White at the hospital and clothing worn on the day of his arrest; (10) failure to seek severance of the "weapon while under disability" charge; and, (11) failure to object to *Brady* violations. Of these eleven claims, five are raised as discrete claims elsewhere in this Opinion. Because the Court finds that those discrete claims have no merit, sub-claims three, six, seven, eight, and eleven will not be reviewed. There, as Petitioner cannot demonstrate the requisite prejudice to establish his ineffective assistance claim.

White raised sub-claims two, four, five, and nine on direct appeal to the Ohio Supreme Court as part of his ninth proposition of law. Therefore, the Court can address those claims on the merits but finds defense counsel did not act unreasonably.[10] As the Ohio Supreme Court stated:

> Given the clear, overwhelming evidence against appellant, defense counsel were faced with a difficult task in preparing a defense. Although defense counsel should have objected in some circumstances, as we have pointed out in other propositions of law, appellant was not prejudiced by trial counsel's omissions. For instance, we recognize that defense counsel should have objected to the prosecutor's comments concerning appellant's unsworn statement, and, if appellant's assertions are

[10] Petitioner also raised these sub-claims during the post-conviction relief proceeding. The Fifth District Court of Appeals denied those claims as barred by *res judicata* because the Ohio Supreme Court already had addressed the issue. *State v. White*, No. 97COA001229, 1998 WL 515944, at 10.

> valid, defense counsel should not have permitted the display of the large photograph of Trooper Gross or a display of his blood-soaked clothing. However, none of the instances raised by appellant in which counsel failed to object amount to prejudicial error. The evidence regarding his guilt was overwhelming, and counsel's errors did not change the result of the trial. *State v. Bradley*, *supra.*

State v. White, 693 N.E.2d 772, 780 (Ohio 1998). The Court finds the Ohio Supreme Court's reasoning is not clearly contrary to established Supreme Court law, i.e., *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, these sub-points are not well-taken.

The remaining sub-claims are procedurally defaulted. The Court will discuss their defaulted status, then address why they also would not succeed were they ripe for a merit review. White did not raise sub-claim one, that counsel admitted to White's guilt in abducting Jean White, until post-conviction proceedings. The Fifth District Court of Appeals found this claim was barred by *res judicata* because White could have raised it on direct appeal but did not. *State v. White*, No. 97C0A001229, 1998 WL 515944, at *30 (Ohio Ct. App. Aug. 7, 1998). Sub-claim ten, that counsel failed to seek severance of a "weapon while under a disability" charge, was not raised in state court. Therefore, White has waived the right for federal review of this claim.

Even if White were entitled to a merit review of these claims, however, they would fail. White claims in his first sub point that "[t]rail [sic] counsel failed to zealously advocate and defend Petitioner when he told the jury that Petitioner was guilty of the abduction charge of Jean White." Petition at 49. The Court disagrees. Defense counsel did

admit that Petitioner restrained and abducted his mother in his opening statement. When taken in context of the entire opening statement, however, it is clear that defense counsel were attempting to develop the intoxication defense counsel to diminish White's culpability. After describing White's childhood and young adulthood, counsel went on to state:

> The evidence will show with reference to Count Three, the abduction or the restraining of his mother, no doubt of his guilt. Although he may not in his mental state at that time fully understood or realized that he was committing an offense, an offense was committed.
>
> I will not stand here and tell you that a phantom did it or somebody else did it. It was committed by Max White; that is, the carrying or the improper handling of a firearm, that was committed by Maxwell.
>
> I will tell you and submit to you that the Defendant Max White is guilty in *fact* of causing the death of Trooper Gross. His actions, what he said in-connection with that particular night, the firing of that weapon, did in fact cause the death of Trooper Gross.
>
> But I submit to you that the evidence will show that the Defendant is not guilty of causing the death of Trooper Gross with the intent or with the mental element of prior calculation and design.

(Trial Tr. at 569-70.)

This statement was not objectively unreasonable. In fact, it was entirely consistent with the intoxication defense counsel intended to present during trial perhaps the only trial strategy available to counsel given the deluge of evidence supporting White's guilt. As White cannot demonstrate that

counsel acted unreasonably by invoking this strategy, the Court finds this sub-claim is without merit.

Finally, in sub-claim ten, White contends that trial counsel should have sought a severance of the "weapon with a disability" charge. Had counsel been successful in bringing about a severance, however, the outcome of the murder trial would not have been altered. As *Strickland* suggests, a reviewing court must look at "the question [of] whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently re-weighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696. Such is not the case here. There is a multitude of evidence supporting White's conviction for the murder of Trooper Gross, including numerous eyewitness accounts. Therefore, the Court is confident that the jury's verdict would not have been altered even it counsel were successful in moving for a severance of the weapon with a disability charge. Consequently, this sub-claim is not well-taken.

F. Jury Instructions

White claims counsel were ineffective for failing to object to jury instructions regarding intoxication and aggravated murder. White also raised these issues as discrete claims in grounds for relief eight and nine, infra at 96. Because the Court finds those claims are without merit, it consequently finds that White cannot demonstrate the requisite prejudice to establish an ineffective assistance of counsel claim. Accordingly, these sub-claims are not well-taken.

Finally, White claims that the cumulative mistakes by effective assistance of counsel. the Ohio Supreme Court. Thus, it Accumulated errors are not "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). If error occurred, but without constitutional significance, then the error is deemed harmless and the verdict sound. *Id.*. Thus, because White cannot demonstrate that any one of his claims amounted to prejudicial error, he cannot succeed on a cumulative error claim.

2. Sixth Ground for Relief

In this ground for relief, White contends that counsel were ineffective in the sentencing or mitigation phase of trial. Many of the arguments White raised in his fifth ground for relief are reasserted here.[11] The Court declines to readdress those arguments. Additionally, White's claims regarding jury instructions are addressed as discrete claims elsewhere in this Opinion. See ground for relief nine, *infra* at 99. Because the Court finds that those claims lack merit, White cannot establish prejudice under *Strickland* to successfully assert an ineffective assistance of counsel claim for failing to object to those instructions. Thus, they are without merit here.

Respondent alleges the remaining claims are

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[11] Specifically, White re-alleges that counsel was ineffective for: (1) requesting a pre-sentence investigation report; (2) failing to object to the introduction of autopsy photographs; (3) failing to raise the issue that White is left-handed even though the state offered testimony that White shot with his right hand; (4) failure to object to David Hobson's testimony; (5) failure to object to prosecutorial comments about White's unsworn statement; and, (6) failure to object to victim impact testimony.

procedurally defaulted. White responds that he raised these claims on direct appeal to the Ohio Supreme Court. Additionally, White asserts that these claims were properly-raised at the state post- conviction proceedings because they contained evidence de *hors* the record. Citing *Mapes v. Coyle*, 171 F.3d 408, 429 (6th Cir. 1999), *cert. denied*, 528 U.S. 946 (1999), White contends that this Court need not defer to the state post-conviction court's finding that White procedurally defaulted his claims for failure to raise them on direct appeal because *Mapes* permits a federal habeas court's review of state court procedural default determinations.

The Court disagreed with White's interpretation of *Mapes*. On appeal from White's post-conviction petition, the Fifth District Court of Appeals found that the materials White submitted to that court to support his petition "are not materials outside the original record which would support appellant's claim for relief . . . ." State *v. White*, No. 97C0A01229, 1998 WL 515944, at *5 (Ohio Ct. App. Aug. 7, 1998) Thus the Fifth District clearly stated that White procedurally defaulted this claim based on the *Perry* doctrine.

More significant, *Mapes* is unavailing to White. In *Mapes*, the Sixth Circuit determined that post-conviction appeals court's decision to deny the petitioner a hearing was not "adequate" to prevent federal review. *Id.* In that case, the trial court refused to rule on an ineffective assistance of appellate counsel claim, determining that because the success of that claim would serve to vacate an appeals court judgment, it did not have authority to do so. On appeal, the appellate court, without explanation, denied the ineffective assistance of appellate counsel claim on the grounds that "the trial court was correct in its opinion that it did not have the power to review the claim." *Id.* The Sixth Circuit determined that because the state court never conducted any procedural analysis with regards to the ineffective assistance of appellate

counsel claim, it was not adequate to support a finding of procedural default.

Such is not the case here. The Fifth District clearly asserted its reasons for finding procedural default. Moreover, its reasoning is supported by the trial court record. Because White did not raise many of his sub-claims on direct appeal, the Court finds them procedurally defaulted. White does not allege that he can establish cause and prejudice to overcome this default. Although defaulted, the Court will address the merits of those claims below after first addressing the merits of the non-defaulted claims.

The Court first determines and analyzes two sub-claims that White raised in his ninth proposition of law to the Ohio Supreme Court: that counsel were ineffective for failing to object to the testimony of Daniel Simcox and Robert Ferguson. The Court finds these sub-claims are not well-taken. White claims that counsel should have objected to the testimony of Daniel Simcox, a Pickerington police officer. In his testimony, Simcox described an incident occurring almost one year prior to Trooper Gross's murder. At that time, Simcox directed White to pull over his vehicle because he had almost hit Simcox's police vehicle. (Trial Tr. at 1771.) Thereafter, Simcox testified, he repeatedly observed White reaching for something underneath his seat. (Trial Tr. at 1774.) Simcox testified that White attempted to roll up his window and "cursed" him. (Trial Tr. at 1776.) Simcox then successfully removed White from his automobile and apprehended him. *Id.* Simcox later learned that White had a firearm underneath his seat. (Trial Tr. at 1778.)

White now claims counsel should have objected to this testimony. White asserts that there are numerous discrepancies between the officer's in-court testimony and the police reports made contemporaneous to the traffic stop. These discrepancies include: that White's driver's side

window was inoperable at the time of the stop, that the firearm beneath White's seat did not have a round in the chamber, that underneath his seat he possessed illegal drugs in addition to the weapon, and that other officers were on the scene sooner than Simcox testified. The Court finds that the discrepancies in information between Simcox's in-court testimony and the police information provided contemporaneously to the traffic stop are de minimus. Additionally, Simcox's testimony was relevant to the state's case as it tended to prove that White had formed a prior intent to injure a police officer who approached him. Thus, counsel was not unreasonable for failing to object to portions of Simcox's testimony or that he be permitted to testify at all.

White also claims counsel should have objected to Lieutenant Robert Ferguson's testimony. The prosecution called Ferguson to testify regarding the purposes of wearing a bullet proof vest and the dangers police officers encounter when attempting to apprehend a fleeing suspect. Although White attacks Ferguson's testimony as "irrelevant" and "prejudicial," that assertion is not wholly accurate. The portion of Ferguson's testimony regarding the dangerousness of a state trooper's occupation may have been irrelevant. Defense counsel, however, objected to this testimony.[12] After counsel's objection, the state went on to question Ferguson regarding the particular dangers a fleeing suspect presents. This testimony was relevant as it tended to prove that, pursuant to Ohio Rev. Code § § 2929.04(A)(3), (6) White's behavior was consistent with fleeing to escape the apprehension of a peace officer. The Court finds counsel did not act unreasonably in this instance. Thus, the Court finds the Ohio Supreme Court's determination that these claims are without merit is not clearly contrary to the Supreme Court

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[12] In fact, the state withdrew this line of questioning based on counsel's objection. (Trial Tr. at 1703.)

precedent based on *Strickland.*

Of the defaulted claims, the Court finds that even if White could somehow obtain a merit review of these claims, they would not be well-taken. These remaining claims can be sub-grouped into three basic categories: failure to investigate, failure to object to Dr. Sunbury's reports, and failure to introduce relevant, supportive evidence. From the first group of claims, White argues that counsel were ineffective for failing to employ a mitigation specialist, neurologist, or pharmacologist, that counsel only met with family members a few times, that counsel did not provide blood alcohol information to Dr. Robert Smith, his psychologist, and that counsel initially told Smith he would only be testifying concerning White's alcoholism, but later requested that Smith supply all mitigating evidence. Consequently, White claims, Smith had inadequate time to prepare for mitigation.

In the second group of claims, White contends that counsel should have opposed a second evaluation that Sunbury performed on him and that counsel should have objected to the state's use of the first report, even though it was not admitted into evidence. Finally, White claims counsel did not introduce evidence that would have been advantageous to him. For example, White alleges, there was information demonstrating that White fired his weapon with his left hand although he is right handed. This "evidence," White asserts, would have corroborated his account of the events, as it demonstrated that he was "firing blindly" rather than aiming his firearm at Trooper Gross.

The Court finds the above arguments lack merit legally and in some instances factually. In determining whether counsel's mitigation investigation stands on firm constitutional ground, the Supreme Court has determined a standard to which a reviewing court must adhere:

> [I]n considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronic, 466 U.S.* 648, 665 n.38 (1984).We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 *U.S.* at 690-691.

Burger v. *Kemp*, 483 U.S. 776, 794 (1987); *see also Williams v. Coyle*, 260 F.3d 684, 706 (6th Cir. 2001) (finding whether further attorney investigation of mitigation facts was reasonably necessary a fact-sensitive inquiry).

In the instant case, counsel's investigation as well as the presentation of mitigation evidence was reasonable. During the penalty phase, counsel called several witnesses to present evidence of White's alcoholism and unhappy childhood. Counsel first called Dr. Smith, a clinical psychologist. Smith found, upon reviewing school, medical, and military records, as well as speaking to White's family members and conducting several tests on White, that he suffered from substance dependence and dysthymic disorders. (Trial. Tr. 1390-91.) Additionally, Jessica Porterfield, a chemical dependency counselor where White reported after being convicted of a previous OMVI charge determined that he was alcohol-dependent but in denial of his problem. Harold Olin, a volunteer who promoted Bible study at the Ashland County Jail, related that White showed remorse for killing Trooper Gross. (Trial Tr. 1534.) Finally, counsel introduced testimony from one of White's friends, his grandmother, and his mother. This testimony provided the jury with a clear portrait of White's substance abuse problems and his difficult childhood.

While White claims counsel should have employed additional experts, the Court finds that further expert testimony would have been cumulative. White claims that coun5el did not provide Smith with adequate records from which he could make a diagnosis. In his testimony, however, Smith describes numerous documents he reviewed, including school and military records, before rendering a diagnosis. Moreover, White complains that counsel did not meet with family members very often. Whether counsel personally met with family members is irrelevant, however, because Smith testified that he had met with them in formulating his report. Thus, counsel's meetings with family are of little import.

Finally, the Court finds that White's assertions concerning evidence that would have aided White's defense, such as his left- handedness, were not particularly helpful to the defense. Even if counsel had sought to introduce evidence that White was left-handed and therefore "firing blindly" rather than aiming directly at Trooper Gross, it would have been to no avail. The Court is not persuaded that such evidence would have swayed the jury. Finally, the Court finds that counsel's failure to object to Sunbury's second report cannot pass the *Strickland* test, as White fails to allege how the contents of this second evaluation were prejudicial to him. Because White cannot demonstrate that counsel acted unreasonably, or that counsel's actions were prejudicial, the Court finds that White's sixth ground for relief is not well-taken.

Seventh Ground for Relief –
Pre-trial Publicity and Failure to Voir Dire

In this ground for relief, White contends he was denied due process because of media coverage before and during the trial. As evidence of this prejudice, White asserts that the trial court inadequately questioned the venire about what they had heard in media reports and their consequent opinions

concerning White's guilt. Alternatively, White argue that his constitutional rights presumably were prejudiced because of the extensive media attention his case received. The Court finds that White properly raised this claim to the Ohio Supreme Court as his seventh proposition of law. Therefore, the Court may address this claim on the merits.

Citing numerous news reports as well as public statements made by then-Governor George Voinovich and state legislators, White claims the venire was tainted. To support such allegations, White cites in his Petition examples of jurors selected for the venire, some of whom eventually served as jurors, who indicated that they were at least familiar with the case.[13] Others expressed a preconception regarding White's guilt but later conceded that they would put aside their initial beliefs and render a verdict based on the evidence adduced at trial. Both White's assertions of prejudice and his claim that prejudice can be presumed lack constitutional merit.

In cases involving pretrial publicity, "the relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984) "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Recently, the United States

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[13] In the Petition, White complains that of the original 60 jurors who were asked about pretrial publicity, only five came forward to admit that they had an opinion regarding White's guilt. Later, however, when the group had diminished to 24 jurors, ten jurors admitted to having formed an opinion as to White's guilt. Two of these venire members served on the jury.

Supreme Court affirmed that a federal court's ability to review voir dire proceedings in state court is limited to "enforcing the commands of the United States Constitution." *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991).[14] In that case, the Court determined that while a trial court must question potential jurors about their exposure to pre-trial publicity, the court need not inquire about what media coverage each had viewed. *Id.* at 431. In upholding the trial court's questioning of the venire, the Court reiterated that "[a] trial court's findings of juror impartiality may be overturned only for 'manifest error.'" *Id.* at 428 (citations omitted). Mindful of the deference a habeas court must relinquish to the trial court's examination, the Court now turns to the Ohio Supreme Court's factual findings concerning the trial court's voir dire.

Upon rejecting this claim on direct review, the Ohio Supreme Court determined that the trial, court questioned prospective jurors sufficiently:

> Contrary to appellant's assertions that the voir dire was inadequate; the record reveals that the contrary is true. It covered three days and four hundred fifty pages of transcript. The trial court asked prospective jurors questions about whether they had read about the murder or heard about it on the radio or television. Several prospective jurors were familiar with the case. The court, as well as counsel for both sides, questioned those who indicated that they could not be fair to the appellant. Following this in-depth questioning, the court excluded several prospective jurors who still felt that they could

[14] The Supreme Court noted that cases tried in federal courts are also subject to the Court's advisory power. *Id.*

> not be impartial due to the pretrial publicity. Appellant has not proven that the jury was prejudiced by pretrial publicity. Nor was the voir dire inadequate in this case. Consequently, we overrule this proposition of law.

State v. White, 693 N.E.2d at 778.

This Court's own review of the voir dire transcripts leads it to conclude that the Ohio Supreme Court's factual determination was reasonable and its conclusion sound. Consequently, White cannot establish that the jurors seated for trial were so prejudiced by pretrial publicity that he was denied due process.

Moreover, White cannot substantiate a claim that prejudice should be presumed. The United States Supreme Court determined that in cases where a media-run "carnival atmosphere" supplants the solemnity and dignity of a courtroom proceeding, a defendant may presume that tile media attention so prejudiced his proceeding as to deny him or her due process of the law. *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966). *Accord Estes v. Texas*, 381 U.S. 532 (1965) (holding prejudice presumed when pre-trial motion hearing subject to extensive radio and television broadcasts); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (concluding media attention prejudiced proceeding, thereby violating defendant's due process right, when local media broadcast defendant's taped-confession in county where defendant stood trial).

In *Sheppard*, the Court determined that intensive media attention both before and during the trial inherently prejudiced the trial. In that case, the Court enumerated several instances of overzealous media reporting. This coverage included extensive media coverage and helicopter fly-overs during the jury view of the crime scene, the trial

court's refusal to ascertain which jurors had heard a radio broadcast in which the defendant was called a perjurer, and a newspaper account where Cleveland police contradicted the defendant's in-court testimony that police had mistreated him. *Id.* at 347-50. Upon reviewing "the totality of the circumstances," the Court determined that in light of the overwhelming media coverage of the case, as well as the fact that there had been no change of venue nor had the jury been sequestered, the Court could presume that the publicity so pervasively infected the proceeding that the defendant's due process rights were denied. The Court remanded to the district court to grant the writ unless the state were to retry the defendant within a reasonable time.

A review of the totality of tire media attention this case received does not suggest that it inherently prejudiced White's trial. Unlike the unbridled media attention the *Sheppard* jury was subjected to, White's jury was sequestered during the course of the trial. Moreover, White does not allege that the flurry of media present in the Sheppard courtroom were present during his trial. White's assertion that he was prejudiced because the trial court permitted seating for police officers and the victim's family is irrelevant to his pre-trial publicity claim. As he cannot show that a fraction of the media transgressions that took place in *Sheppard* or *Rideau* occurred in his case, the Court determines that in viewing the totality of the media coverage White's case received, he was not prejudiced thereby.

Finally, White claims in this ground, although somewhat irrelevant to his principal claim, that Juror Dorothy Schade was unconstitutionally excused from the jury because she was seventy years of age. White alleges this act was improper and unconstitutional, yet provides no support for this conclusion. Without case law to support this claim or further factual support to develop it, the Court finds it has no merit. Accordingly, White's seventh ground for relief is not

well-taken.

Eighth and Ninth Grounds for Relief

In his eighth and ninth grounds for relief, White maintains that the trial court erred when charging the jury on several occasions during the guilt and mitigation phases of trial. The Court will examine these claims individually, mindful that an incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous or universally condemned. Instead, the instruction must violate a constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Upon review, a court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence. *Boyd v. California*, 494 U.S. 370, 380 (1990). The impropriety of the instruction must be considered in the context of the instructions as a whole and the trial record. *Id.* Because jury instruction errors typically are matters of state law, the standard for demonstrating that a jury instruction caused constitutional error in a habeas proceeding "is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). A habeas petitioner's "burden is especially heavy [when] no [affirmatively] erroneous instruction was given . . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155. The Court now turns to White's individual claims for relief.

1. Eighth Ground for Relief - Intoxication Instruction

In this ground for relief, White complains that the trial court both erroneously charged the jury on the intoxication defense and failed to instruct the jury regarding the burden of proof necessary to establish this defense. The Court finds that this claim is not procedurally defaulted because White raised

this issue to the Ohio Supreme Court as his third proposition of law. Accordingly, the Court will address the merits of the claim.

White first argues that the trial court improperly instructed the jury regarding intoxication, vitiating this defense in so doing. The trial court stated in its intoxication instruction:

> Intoxication exists when a person consumes a quantity of an intoxicating beverage containing alcohol sufficient to adversely affect his mental processes, conduct, actions and reactions and to deprive him of that clearness of intellect that he would otherwise have possessed.
>
> Intoxication is not an excuse for an offense. However, such evidence is admissible for the purpose of showing that the Defendant was so intoxicated that he was incapable of forming the purpose to commit the offense of aggravated murder.
>
> The mere fact that a Defendant is intoxicated does not make him incapable of acting with prior calculation and design.
>
> Now to determine whether or not the Defendant was influenced by the effect of intoxication to such an extent that his mind could not and did not form a purpose to take the life of another with prior calculation and design, you will consider the facts and the circumstances relating to his condition at the time in question.
>
> If you find that by reason of intoxication the mind of the accused was in such condition that he was not capable of forming a purpose to take the life of another with prior calculation and design, then he is not guilty of aggravated murder, as purpose is an essential element of that

> offense.
>
> Now if the evidence warrants it in this case with regard to Count One, you may find the Defendant guilty of an offense lesser than that charged in the indictment.

(Trial Tr. at 1267-68) (emphasis supplied.) White asserts that the above-emboldened language "stripped him" of his right to present an intoxication defense because it essentially informed the jury that intoxication cannot excuse White's actions.

The Court disagrees. The trial court properly instructed the jury that intoxication negates the finding of the element of "purpose," a necessary finding to convict him of aggravated murder. The trial court's instruction correctly informed the jury that while intoxication does not completely permit a defendant to escape criminal liability, it can reduce the conviction to a lesser-included offense. White's contention that the jury completely disregarded the intoxication instruction based on the single statement that intoxication is not an excuse is belied by the remaining language in the intoxication instruction. Thus, taken in its entirety, the Court finds that this instruction comports with constitutional stricture.

Moreover, White cannot successfully argue that the failure to supply the jury with the burden of proof necessary to establish an intoxication defense resulted in a constitutional violation. The court informed the jury that the prosecution bears the burden of establishing each element of the offense beyond a reasonable doubt. The failure to further inform the jury of White's obligation of proof was not prejudicial. As one Ohio court noted in a case involving the similar affirmative defense of diminished capacity:

> Uninstructed as to the appellant's burden of

> proof in this aspect of the case, the jury was left with the general instruction as to the burden of the State to prove all elements, including purpose as possibly affected by diminished capacity, beyond a reasonable doubt. Any assertion of prejudice would, therefore, more appropriately come from the State.

State v. Rutledge, No. 3151, slip op., 1981 WL 4000, at *4 (Ohio Ct. App. May 27, 1981)

Finally, the Ohio Supreme Court analyzed this claim and concluded White did not suffer prejudice from this instruction:

> Contrary to appellant's assertion, the challenged instruction does not state that intoxication is not a valid defense. It simply points out that intoxication 'is not an excuse for an offense' and that it can be used to negate specific intent. We have held that intoxication may be considered in determining whether the defendant was capable of forming the specific intent essential to the charged crime. See State v. Fox (1981), 68 Ohio St.2d 53, 55, 22 O.O.3d 259, 260, 428 N.E.2d 410, 411-12. The challenged instruction follows this law. Moreover, we have previously held that the decision to instruct the jury on intoxication rests within the sound discretion of the trial judge and that no instruction need be given where there is insufficient proof of intoxication. *State v. Wolons* (1989), 44 (Cite as: 82 Ohio St.3d 16, 26, 693 N.E. 2d 772, 781) Ohio St.3d 64, 541 N.E.2d 443, paragraph two of the syllabus. The evidence in this case shows that appellant acted deliberately, and that his defense of intoxication was weak. Since the evidence of intoxication

> could not have supported a verdict of acquittal, the trial court could have chosen not to instruct on intoxication at all. However, even if the jury instruction given was misleading, because it did not include language regarding the burden of proof, we find that this omission does not constitute prejudicial error.

State v. White, 693 N.E.2d at 781.

Because the Ohio Supreme Court's reasoning is not clearly contrary to established Supreme Court precedent, the Court finds this claim is not well-taken.

2. Ninth Ground - Erroneous Jury Instructions

In this ground for relief, White asserts that the trial court instructed the jury erroneously on several occasions, thereby denying his Fifth, Sixth, Eighth and Fourteenth Amendment rights. The Court notes that White raised this issue in the Ohio Supreme Court as his tenth proposition of law. The Ohio Supreme Court summarily rejected this claim. Thus, this Court will examine the merits of the claim, then subject it to a "reasonableness" review as outlined in the fourth ground for relief, *supra.*

White first claims that the trial court's reasonable doubt instruction improperly delineated a "clear and convincing" standard, enabling the jury to convict him on a standard below that required by the Due Process Clause of the Fourteenth Amendment. At the close of the culpability phase of trial, the court read the standard definition of reasonable doubt found in the Ohio Revised Code § 2901.05[15] The Sixth

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[15] That statute reads:

(D) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence,

Circuit has ruled that Ohio's statutory definition of reasonable doubt does not offend due process. *Thomas v. Arn*, 704 F.2d 865, 867-69 (6th Cir. 1983). To offend due process, the instruction must be of the type that could mislead the jury into finding no reasonable doubt when in fact there was some. *Id.* at 868; *Holland v. United States*, 348 U.S. 121, 140 (1954). In the present case the trial court merely read the statutory jury instruction that has been found constitutional. The instruction cannot be considered misleading. Because the statutory definition has been approved time after time, raising this issue yet again is a total waste of the Court's time.

White also claims that the trial court's instruction on purposeful killing unconstituionally shifted the burden of proof, thereby denying White due process. When defining purpose to kill, the trial court instructed the jury as follows:

> Now we need to define for you certain terms. The word "purposely." Purpose to kill is an essential element of the crime of aggravated murder.
>
> A person acts purposely when it is his specific intention to cause a certain result.
>
> It must be established in this case that at the time in question, there was present in the mind of the Defendant a specific intent to kill

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cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.
Ohio Rev. Code § 2901.05(D).

Trooper James Gross.

When the gist of the offense is a prohibition against conduct of a certain nature, a person acts purposely if his specific intention was to engage in conduct of that nature, regardless of what he may have intended to accomplish by his conduct.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally.

Purpose and intent mean the same thing. Purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

Now the purpose with which a person does an act or brings about a specific result is determined from the manner in which it is done, the means or weapon used and all the other facts and circumstances in evidence.

(Trial Tr. at 1258-59.)

Pursuant to the Fourteenth Amendment, the state must prove each element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). A jury instruction which states that "the law presumes a person intends the ordinary consequences of his voluntary acts" violates the right to due process because it creates a mandatory presumption that unconstitutionally shifts the burden of proof to the defendant. *Sandstrom v. Montana*, 442 U.S. 510 (1979)

White contends that the trial court's instruction required the jury to find "purpose" merely because Gross died. The Court makes no such conclusion from the charge given. The Ohio Supreme Court previously has upheld this instruction.

See *State v. Montgomery*, 575 N.E.2d 167, 171-72 (Ohio 1991) (finding instruction stating "purpose with which a person does an act is determined from the manner in which it is done, the means used, and all other facts and circumstances in evidence" does not create irrebuttable presumption of finding element of intent) The Court finds this instruction comports with supreme Court precedent in *Winship* and *Sandstrom* because is does not impermissibly shift the burden to defendant nor does it require the jury to find White purposely killed Gross because of the nature of his death. Consequently, this instruction was not prejudicial to White. It is time for habeas counsel to stop raising this issue as well.

Finally, White claims that the trial court failed to instruct the jury regarding the weighing process of aggravating circumstances and mitigating factors. The Court finds this claim factually incorrect. In his Petition, White provides numerous cites in which the trial court allegedly misinformed the jurors regarding the weighing process. The cites that White provides, however, are to the voir dire transcript, when the trial judge briefly provided the venire with a depiction of what would occur during a potential mitigation phase for purposes of questioning the jurors. During the close of the actual mitigation phase, the court provided a complete instruction concerning the jury weighing responsibilities after delineating the aggravating factors and mitigating circumstances:

> Now the aggravating circumstances in this case are two in number.
>
> First, at the time of the offense presented in Count One - that is, the aggravated murder count, the victim; that is, James Gross, was a peace officer, as defined in Section 2935.01 of the Revised Code, whom Maxwell D. White, Jr., had reasonable cause to know or knew to be such, and who at said time was engaged in his

duties as a peace officer.

The second aggravating circumstance: At the time of the offense presented again in Count One, Maxwell D. White, Jr., committed said offense for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by Maxwell D. White, Jr.

So you are to consider all the evidence, the arguments, the statement of the Defendant, the presentence investigation, the mental examination report, and all other information and reports which are relevant to the nature and circumstances as - that are relevant to the nature and circumstances of the aggravating circumstance, as I've outlined those for you, or to any mitigating factors, including but not limited to the nature and circumstances of the offense, and the history, character and background of the Defendant, and of the following: The youth of the Defendant; the Defendant's lack of a significant history of prior criminal convictions and delinquency adjudications; and any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

Now the prosecutor in this case has the burden to prove beyond a reasonable doubt that the aggravating circumstances of which the Defendant was found guilty outweigh the factors in mitigation of imposing the death sentence.

Now "to outweigh" means to weight more than, to be more important than the existence of mitigating factors, and does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.

(Trial Tr. at 1870-71.)

> In addition to the above claim, White supplies the Court with a laundry list of instructions which the trial court did not read to the jury. The Court finds it unnecessary to review each of these proposed instructions as the instructions the trial court provided were constitutionally sound. Given the strictures within which a habeas court must review an omitted instruction, the Court determines that the instructions provided did not offend the constitution. Therefore, White's ninth claim for relief is not well-taken.

Tenth Ground for Relief - Fully Informed Sentencing

In his tenth ground for relief, White asserts that both the jury and trial judge were misinformed when rendering their sentencing decisions. Specifically, White claims that the trial court did not fully and accurately instruct the jury as to its sentencing options. Furthermore, he contends that the trial court, contrary to Ohio law, used impermissible aggravating circumstances when accepting the jury's verdict recommendation.[16] The Court finds this claim is not procedurally defaulted, as White raised this issue as proposition of law fourteen to the Ohio Supreme Court. That court denied the claim without opinion. Accordingly, this

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[16] Pursuant to Ohio Rev. Code § 2929.03(F), the trial court must state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Court will address the merits of the claim, then subject the claim to a reasonableness review.

White essentially claims his sentencing was tainted in two respects: First, White asserts that--the trial judge believed that even if the jury imposed one of the life sentences, White could receive early parole for good behavior in prison. Moreover, White asserts, the jury was left uninformed that a possibility of parole after twenty or thirty years did not mean that White would actually receive it. Because the trial court denied defense counsel's motion to read their proposed sentencing instructions that included this explanation, White argues, the jury did not receive accurate information about its sentencing choice. White also claims that the trial court impermissibly weighed an aggravating circumstance when it considered White's future dangerousness and parole eligibility in accepting the jury's death recommendation. Upon reviewing the jury instructions the trial court gave the jury, and the trial court's own reasoning when choosing to accept the jury's verdict, the Court finds no constitutional violation.

Recognizing that death is a qualitatively different form of punishment, the United States Supreme Court has determined that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court expounded upon this mandate by holding that a defendant is entitled to present any mitigating factor that would serve as a basis for a jury to make a decision for a sentence less than death.

In addition to having full knowledge of the defendant,

the Court determined in *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994), that due process requires a sentencing jury be instructed of a defendant's parole ineligibility if state law so provides. A trial court also may, but is not required to, inform a jury about a defendant's possibility of parole from a governor's power to commute a life sentence if state law so provides. *California v. Ramos*, 463 U.S. 992 (1983). Further state-law considerations are not matters redressable on habeas review. *Gall v. Parker*, 231 F.3d 265, 332 (6th Cir. 2000).

In this case, the trial judge properly instructed the jury on several occasions about its sentencing options. Initially the court charged:

> Therefore, you shall determine whether the aggravating circumstances the offender herein, Maxwell D. White, Jr., was found guilty of committing are sufficient to outweigh the mitigating factors present in the case.
>
> If you find by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweighed the mitigating factors, as I've defined the term "outweigh," you will recommend to the Court that the sentence of death be imposed on the offender.
>
> Absent such a finding, you shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving 20 full years of imprisonment or to life imprisonment with parole eligibility after serving 30 full years of imprisonment

(Trial Tr. at 1872-73.)

The court thereafter repeated the jury's sentencing

choices before instructing it on the verdict forms. (Trial Tr. at 1876-77.) Because the trial court advised the jury that the defendant would serve twenty or thirty full -years of imprisonment, the Court finds that a juror would naturally interpret that word to mean that White was not eligible for parole until the allotted time expired. The Constitution requires no further explanation.

Furthermore, the trial court, in accepting the jury's verdict, did not exceed federal constitutional bounds. Although the trial judge did, in fact, state during a motion hearing that he read a case that held a life sentence with parole would entitle the defendant to "good time" (Trial Tr. at 1328), the court neither so instructed the jury nor articulated such a belief when accepting the jury's recommendation. When imposing sentence, the trial court properly noted that it must consider the two established aggravating circumstances and listed a number of mitigating factors in the case. Thereafter, the trial court noted:

> [The defendant's] unhappy and in some respects battered childhood was unfortunate but has not from the overwhelming weight of the professional evidence caused him to become psychotic. It has perhaps been responsible to some degree in causing him to be a person with superficial and shallow restraints.
>
> More significantly it has developed a person with dangerous propensities likely to explode at any time. The Defendant could be described as a human time bomb waiting to explode. And this is exactly what happened in this case at Milepost 190 in Ashland County, Ohio, and the results were devastating.
>
> There is no evidence to suggest that the same type of delayed explosive reaction would not occur again unless action is now taken to permanently prevent it.

(Trial Tr. at 1901-02.) White asserts that this statement concerning his future dangerousness, coupled with the trial court's belief that he was eligible for early parole based on his prison behavior, led to a constitutionally defective sentencing.

The Court disagrees. Pursuant to Ohio law, "[t]he length of incarceration to be served by the defendant before parole eligibility is not a fact about the defendant's character or background, or about the circumstances of the offense. Thus, it is not a mitigating factor for Eighth Amendment purposes." *State v. White*, 709 N.E.2d 140, 155-56 (Ohio 1999) (citations omitted). White cannot, therefore, allege that the trial court did not consider this fact in mitigation. More important, the Supreme Court has recognized that considering a defendant's future dangerousness when making a sentencing decision is not unconstitutional. "Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system . . . . And any sentencing authority must predict a convicted person's probablefuture conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976)

Attempting to buttress his claim, White cites *Skipper v. South Carolina*, 476 U.S. 1 (1986) and *Beck v. Alabama*, 447 U.S. 625 (1980) as instructive. These cases, however, are easily distinguishable. In *Skipper*, the Court determined that it was unconstitutional for a trial court to find inadmissible two mitigating witnesses who were to testify about the defendant's adjustment to prison life. The Court held in Beck that, in the culpability phase of trial, a jury in a capital case must be permitted to consider a verdict of guilt for a non-capital offense if the evidence supports it. As neither factual scenario is presented here, the Court finds these cases unper5uasive. Because White does not articulate a constitutional violation based on the facts of his proceeding, his tenth claim for relief must fail. Thus, the Ohio Supreme

Court was not unreasonable in denying this claim.

Eleventh Ground for Relief - Mitigating Evidence

In the eleventh ground for relief, White argues that both the prosecutor and trial court improperly utilized information pertaining to White's sanity although sanity was not at issue. Specifically, White claims that the prosecutor introduced Dr. Sunbury's reports to refute evidence concerning White's mental state. White maintains that the prosecutor should not have presented such evidence to rebut Dr. Smith's testimony because neither Smith, nor any other defense witness, raised White's sanity as a mitigating factor. Moreover, White asserts that in its opinion accepting the jury's recommendation, the trial court "rewrote" Dr. Sunbury's report when it utilized that report to conclude that White suffered from no mental disease or defect. Because White raised this claim on direct appeal as his fifth proposition of law to the Ohio Supreme Court, the Court finds this claim may be addressed on its merits.

White asserts the prosecutor acted improperly in two instances: First, White argues, the prosecutor improperly refuted Dr. Smith's testimony with Dr. Sunbury's report. White contends that once Dr. Sunbury completed his initial report and the defense withdrew its not guilty-by reason of insanity plea, White's sanity was no longer at issue. While White presented evidence under the "catch-all" mitigating factor pursuant to Ohio Rev. Code § 2929.04 (B) (7), he asserts that the prosecution's rebuttal case attempted to disprove the (B) (3) mitigating factor of insanity. Thus, White claims, the prosecution's use of Dr. Sunbury's report to refute Dr. Smith's claim that White suffered from alcohol and drug dependency as well as dysthymia was improper. Additionally, White asserts that the state unconstitutionally raised White's sanity again during closing argument.

White cites to *Eddings v. Oklahoma*, 455 U.S. 104 (1982) to give federal habeas support to his essentially state-based claim. In his Petition, White asserts the *Eddings* holding thus:

> In *Eddings*, the sentencer refused to give mitigating weight and effect to psychological evidence about the capital defendant's emotional disorder, an antisocial personality, because that disorder did not rise to the level of insanity. The United States Supreme Court found this violative of the Eighth and Fourteenth Amendments and reversed the death sentence.

(Petition at 127.)

The Court finds this a factually and legally incorrect summation of *Eddings*. Rather than refusing to give effect to mitigating evidence after weighing it, the trial court in *Eddings* had determined that, as a matter of law, it had to exclude relevant mitigating evidence of the defendant's background when determining whether the death penalty is appropriate. There, the sixteen-year-old defendant had murdered a police officer who had pulled his car over during a traffic stop after the defendant had decided to run away from his troubled and abusive home. The trial court noted that "'in following the law' it could not 'consider the fact of this young man's violent background.'" *Eddings* 455 U.S. at 113. Consequently, the Court held that because the trial court refused to consider this mitigating evidence as a matter of law, particularly in light of the defendant's youth, the trial court had violated the *Lockett* principle of considering all mitigating evidence.

The Court emphasized, however, that the trial judge's error did not stem from "evaluat[ing] the evidence in mitigation and find[ing] it wanting as a matter of fact," but from finding, "*as a matter of law* he was unable even to

consider the evidence." *Id.* (emphasis in the original). Thus, White's assertion that the *Eddings* holding involves an unconstitutional exclusion of mitigating evidence because the court confused it with a legal test for sanity is incorrect. Accordingly, White's claim cannot find legal support that a federal constitutional error occurred.

Even if White's interpretation of *Eddings* were correct, however, the Court finds White's claim that the prosecution impermissibly confused the jury about mitigation as opposed to sanity evidence is not founded in fact. During defense counsel's direct examination of Dr. Smith, Smith concluded that White suffered from chemical dependence and dysthymia. (Trial Tr. at 1390, 1395.) While the prosecution initially questioned Dr. Smith on cross-examination regarding the compatibility of medical psychiatric findings with legal definitions of sanity, defense counsel objected to this line of questioning and the subsequent sidebar conference took place:

> Defense Counsel: Placing this on the record as far as any other factors: There's not any direct testimony for us to be talking about any mental disease or mental disorders according to that special section in mitigation factors. He's talking about mental disease or defect.
>
> Prosecutor: Not knowing whether that's coming under mental disease or mental defect. If you are not going to raise that as a mitigating factor, I will stop the examination on that point. I asked him if he thought it was, and there's where we got into it.

Defense Counsel: Psychologists and psychiatrists have different definitions for mental disease and defect than what the law has.

Prosecutor: I agree. If you are not going to make that argument, I'll stop the examination of that right now.

(Trial Tr. at 1499-1500.) Thereafter, the prosecution refrained from further questioning on White's sanity. White's additional claim that the prosecution's use of Dr. Sunbury's report to rebut the findings of Dr. Smith was unconstitutional concerns questions of admissibility not redressable by a habeas court unless they deny a defendant a fair trial. *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997), *cert. denied*, 523 U.S. 1032 (1998). The Court finds no such violation here.

White also makes much of the fact that the prosecutor argued, during his summation, that White was not insane. The trial court instructed the jury, however, that counsel's opening and closing statements did not constitute evidence. (Trial Tr. at 1874.) The trial court properly instructed the jury that they could consider any evidence in mitigation.[17] Jurors

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[17] The judge instructed the jury that it could consider any mitigating factor:

> . . . including but not limited to the nature and circumstances of the offense, and the history, character and background of the Defendant, and of the following: The youth of the Defendant; the Defendant's lack of a significant history of prior criminal convictions and delinquency adjudications; and any other factors that are relevant to the issue of whether the Defendant should be sentenced to death.

(Trial Tr. at 1871.)

are presumed to apply and utilize the legal standards provided them in the jury instructions. *United States v. Brown*, 983 F.2d 201, 202-3 (11th Cir. 1993). Thus, the sentencer presumably considered all mitigating evidence as prescribed by *Lockett*.

Although somewhat out of context, White asserts in his Traverse that his Fifth Amendment right against self-incrimination was violated when he underwent a mental examination by Dr. Sunbury because Dr. Sunbury did not notify White of his *Miranda* rights prior to examining him. White cites *Estelle v. Smith*, 451 U.S. 454 (1981) for the proposition that a criminal defendant must receive *Miranda* warnings prior to undergoing a court-ordered mental examination. That case, however, is inapposite.

In *Estelle*, the Supreme Court determined that a state may not be permitted to have a psychiatrist examine and testify about a defendant's potential for future dangerousness when the defendant had no knowledge of the examination's purpose. In that case, the examining psychiatrist testified that the defendant posed a great risk if reintroduced into society based on the defendant's recount of the crime during the examination. *Id.* at 464. The *Estelle* court found that, under the facts of that case, the psychiatrist was acting as an agent of the state and, thus, the defendant's Fifth Amendment rights were implicated.

The Supreme Court, however, recently noted that *Estelle's* holding has been limited to its facts. *Penry v. Johnson*, - U.S.- , 121 S. Ct. 1910, 1919 (2001). In *Penry*, the Court factually distinguished *Estelle*. For example, the presentation in *Estelle* of the psychiatric testimony was in the state's case-in-chief rather than on rebuttal, as in *Penry*. The Court concluded that the Texas state court's decision was not contrary to established Supreme Court precedent.

The Court then determined that, even if the state's use of the state psychiatrist's report was a Fifth Amendment violation, such error could overturn a sentence only if the error had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (further citations omitted).

Initially, this Court notes that, like the *Penry* prosecutor, the prosecution in White's trial utilized Dr. Sunbury's testimony solely to rebut Dr. Smith's findings that White suffered from alcohol dependency and dysthymia. Moreover, unlike the *Estelle* defendant, Dr. Sunbury notified White before examining him that no confidentiality existed between them and that Dr. Sunbury would be notifying the trial court of his findings. Thus, the Court finds it unlikely that a Fifth Amendment violation occurred.

Nevertheless, this Court, like the *Penry* court, will conduct a harmless error analysis concerning the prosecutor's use of Dr. Sunbury's report.[18] In so doing, the Court finds that no harmful error occurred. A review of the prosecutor's cross-examination of Dr. Smith reveals that the prosecution introduced portions of Dr. Sunbury's report to undercut Dr. Smith's testimony that the Petitioner truly suffered from alcohol dependency and dysthymia because he had exaggerated his mental troubles in the past. (Tr. Trans. at 1428.) The Court finds that, had the prosecution not raised this issue, the outcome of the mitigation proceeding would not have been altered.

The prosecution's use of Dr. Sunbury's report was to diminish Dr. Smith's credibility in finding that White

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[18] The Court notes that the *Brecht* test, cited in *Penry*, applies to post-AEDPA cases. *Bulls v. Jones*, -F.3d-, No. 00-1289, 2001 WL 1456335, at * 4 (6th Cir. Nov.19th, 2001).

suffered from any mental afflictions. However, Dr. Smith's credibility also was impeached by the prosecution's line of questioning that Dr. Smith had testified favorably for the defense in numerous other murder trials Thus, the exclusion of Dr. Sunbury's report would not have changed the outcome of the sentencing proceeding, as it was one of several efforts to diminish Dr. Smith's credibility with the jury. Consequently, the Court finds any Fifth Amendment error that occurred was harmless.

Finally, White asserts that the trial court "rewrote" Dr. Smith's report in its § 2929.03(F) opinion by finding that the disorders from which Smith found White suffered were not mitigating evidence pursuant to (B)(3) . The Court disagrees with White's factual assertion. While the trial court did note that the record was void of evidence that White possessed a mental disease or defect, it went on to state that:

> It's most regrettable that his formative years were so negative, but this cannot excuse any person who commits such a heinous and senseless act as we see in this case.
>
> His unhappy and in some respects battered childhood was unfortunate but has not from the overwhelming weight of the professional evidence caused him to become psychotic. It has perhaps been responsible to some degree in causing him to be a person with superficial and shallow restraints.

(Trial Tr. at 1901.) Thus, as *Eddings* mandates, the trial court considered White's difficult childhood as a mitigating factor but gave it little weight. White's assertion that the trial court "rewrote" Dr. Smith's report has little relevance. The trial court's opinion comports with all constitutional mandates. The Court finds that the Ohio Supreme Court was not unreasonable for finding this claim to be without merit. Accordingly, White's eleventh claim for relief is not well-

taken.

Twelfth Ground for Relief - Insufficient Evidence

In his twelfth ground for relief, White alleges that the evidence adduced during trial was insufficient to prove that he killed Trooper Gross with prior calculation and design. Initially, the Court notes that Respondent asserts this claim is procedurally defaulted. White failed to raise this claim at any point during his direct appeal or in the post-conviction proceedings. White does not dispute that he failed to raise this claim in his direct appeal. He argues, however, that he can demonstrate cause and prejudice for the default based on his appellate counsel's failure to raise this claim on direct appeal and failure of his post-conviction counsel to raise this issue in a *Murnahan* proceeding.

The Court does not agree that White can establish cause and prejudice. White has presented no argument, aside from bare assertion, that his counsel's failure to raise this claim constituted ineffective assistance of appellate or post-conviction counsel. White's appellate counsel may have chosen to exclude this claim as a strategy not to diffuse stronger claims with weaker claims, such as this one. Moreover, because he received assistance of counsel to file a *Murnahan* petition, he cannot now claim post-conviction counsel's ineffectiveness for failure to raise this issue in a *Murnahan* application. Accordingly, the Court finds this claim procedurally defaulted.

Were it not defaulted, this claim would not present a constitutional infirmity during White's trial. In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Supreme Court determined the correct standard of review that a habeas court must employ. It concluded that the habeas court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact

could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. In reviewing this standard, the Sixth Circuit determined in *York v. Tate*, 858 F.2d 322, 330 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989), that a habeas court must apply only the Jackson standard when reviewing-a sufficiency of evidence claim, rather than be guided by Ohio common law.

In complying with this mandate; this Court must limit itself to evidence adduced during trial, as a "sufficiency of evidence review authorized by *Jackson* is limited to 'record evidence.' *Jackson* does not extend to non-record evidence, including newly discovered evidence." *Herrera v. Collins*, 506 U.S. 390, 402 (1993) (citing *Jackson*). When viewing the evidence in a light most favorable to the prosecution, as it must, the Court finds this claim cannot withstand a *Jackson* review. The Court finds ample evidence exists, such as White's prior statement that he would "cap the ass" of the next police officer to stop him, his collection of weapons, and the fact that he tied up his sister and mother so they would not prevent his departure are sufficient to prove White's prior calculation and design. Thus, the Court finds this claim to be without merit.

Thirteenth Ground for Relief - Gruesome Photographs

In his thirteenth ground for relief, White asserts that the trial court improperly admitted gruesome photographs of the victim contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim is not procedurally defaulted, as it was raised as the sixth proposition of law on direct appeal to the Ohio Supreme Court and denied without opinion. Thus, the court will address the merits of this ground for relief, then subject the Ohio Supreme Court's conclusion to a reasonableness review.

In this ground for relief, White alleges that multiple

photographs and exhibits introduced during trial were unduly prejudicial, thereby denying him the right to a fair trial. Specifically, White alleges that the trial court should have excluded photographs depicting the crime scene, coroner's photographs of Trooper Gross before he was cleansed at the autopsy, and cumulative photographs. White also objects to the admissibility of the Trooper's blood-stained clothing.

Admission of evidence is a matter of state law, and alleged error, such as improper admission of evidence, usually does not support a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). A state law violation, however, may rise to the level of a due process violation if it created a serious risk of convicting an innocent person. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996). Barring this circumstance, a federal court must defer to the state Court's interpretation of its own rules of evidence and procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989). A federal court does not act an as an additional court of appeals to review a state court's interpretation of its own laws. *Id.*

The admission of the photographs White alleges are prejudicial was within the sound discretion of the trial court. Admission of gruesome photographs in a murder case typically does not justify collateral relief, even if cumulative and likely to inflame the jury. *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997), *cert. denied*, 523 U.S. 1032 (1998). There is no evidence in this case, other than White's mere allegation, that the photographs introduced violated his right to a fair trial. Moreover, there was ample evidence adduced at trial of White's guilt to provide this Court with confidence that the trial court did not convict an innocent person. The Ohio Supreme Court correctly denied this claim on direct appeal.

White also asserts that the prejudicial effect of providing

access to these items was not merely confined to the guilt phase, but had a "carry-over" effect to the penalty phase of trial. The Court disagrees. The jury is presumed to follow the trial court's instructions. *Greer v. Miller*, 483 U.S. 756, 767 n.8 (1987); *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041 (6th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996). The trial court properly instructed the jury regarding what should be considered evidence to support both aggravating circumstances and mitigating factors. White's bare allegation that the jury was unable to follow this instruction is not supported by any evidence.

Finally, White attempts to mold this state-law claim into a claim cognizable for federal relief by noting that the Sixth Circuit in *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000), recently granted habeas relief to a petitioner based on trial counsel's failure to object to the admissibility of evidence. The Court finds White's attempt at analogy to the current claim unsuccessful. An ineffective assistance of counsel claim is based on the *Strickland* standard as noted, *supra.* Admissibility of evidence claims, as noted above, are matters for state courts to decide unless they are so egregious as to deny a defendant the right to due process. No such denial is implicated here. Consequently, the Court finds White's thirteenth ground for relief is not well-taken.

Fourteenth Ground for Relief - Right to Be Present at Critical Phase of Trial

In this ground for relief, White contends a constitutional violation occurred because he was absent during a motion hearing and court review of proposed jury instructions in the mitigation phase of trial. This claim is not procedurally defaulted, as the defendant raised this claim as proposition of law eleven on direct appeal. The Court finds this claim fails, as the Ohio Supreme Court's opinion is not clearly contrary

to federal law.

The trial court conducted a motion hearing outside the jury's presence, to address thirteen defense motions and defense counsel's proposed jury instructions. The trial court noted the defendant's absence at the outset:

Court: We are in Case No. 96-CRI-07366, the State of Ohio vs. Maxwell D. White, Jr.

I notice the Defendant is not present at this hearing this morning. This is an important hearing with regard to what this Court is going to charge

Counsel: If it please the Court, Judge, it's my understanding that arrangements had been made for the Defendant to be transported to the forensic diagnostic center at 9 o'clock, Judge.

And although I understand that it's important, I believe we can waive his appearance. And if the Court would desire, I will draw up a waiver for the Defendant to sign.

Court: I want to put in the record, yes sir.

Counsel: We'll put that on the record, Judge. I think it would suffice.

(Trial Tr. at 1315.) Despite counsel's assurance, White's waiver was never placed on the record. In analyzing this claim, the Ohio Supreme Court found the absence of waiver to be without constitutional significance:

> Appellant was not present at a hearing where proposed jury instructions were considered. Prior to this hearing, defense counsel advised the court that he

> would execute a waiver of the defendant to sign, and would make it part of the record. However, that was never done. In Proposition of Law XI, appellant contends that his constitutional right to be present at all proceedings was violated when defense counsel waived his presence at this hearing.
>
> We have previously held that a defendant "has a fundamental right to be present at all critical stages of his criminal trial." State v. Hill (1995), 73 Ohio St.3d 443, 444, 653 N.E.2d 271, 281. However, the right to be present is not absolute. State v. Meade (1997), 80 Ohio St.3d 419, 421, 687 N.E.2d 278, 280. Therefore, even if a defendant should have been present at a stage of the trial, "[e]rrors of constitutional dimension are not ipso facto prejudicial." State v. William (1983), 6 Ohio St.3d 281, 286, 6 OBR 245, 349, 452 N.E.2d 1323, 1330. Prejudicial error exists only where "a fair and just hearing [is] thwarted by [defendant's] absence." Snyder v. Massachusetts (1934), 291 U.S. 97, 108, 54 S.Ct. 330, 333, 78 L.Ed. 674, 679.
>
> We find that appellant's absence, during the hearing on proposed instructions did not deprive him of a fair trial. Accordingly, his absence and the failure of defense counsel to make a written waiver for the record were harmless beyond a reasonable doubt. Chapman v. California (1967), 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 709.

State v. White, 693 N.E.2d 772, 781 (Ohio 1998)

While White acknowledges that the Ohio Supreme Court found no merit to this claim, he asserts that the case on which that court based its decision, *Snyder v. Massachusetts*, "has long been overruled." Traverse at 140. Moreover, White

claims, the Sixth Circuit recognized *Snyder*'s overruling in *Charles v. Baesler*, 910 F.2d 1349 (6th Cir. 1990). The Court finds this characterization of *Snyder's* viability misleading. Although *Snyder* was, in fact, partially overruled by *Malloy v. Hogan*, 378 U.S. 1 (1964), Snyder's holding regarding the defendant's presence at trial remains intact. In *Snyder*, the Court determined that the defendant's absence on a jury view did not violate his Fourteenth Amendment right to due process. In so holding, the Court went on to note in another section of the case: "[t]he privilege against self-incrimination may be withdrawn and the accused put on the stand as a witness for the state." *Snyder*, 291 U.S. at 105. It is this statement which the *Malloy* Court revisited. See *Malloy*, 378 U.S. at 2 ("In this case we are asked to reconsider prior decisions holding that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment."). Thus, the Ohio Supreme Court's conclusion, based on Snyder, was not clearly contrary to federal law.

Finally, White proclaims that *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960), presents "a fact situation remarkably similar to Petitioner White's" and, thus, is controlling authority. Traverse at 142. The Court disagrees with this factual assessment. That case involved the defendant's absence from the courtroom as the trial court charged the jury regarding questions they had after initial deliberations. White was merely absent from a hearing concerning what to charge. He was present during the trial court's actual charging of the jury. Moreover, *Evans* involved a direct appeal from a criminal trial. Thus, the *Evans* court was not controlled by the state-deferential standard of review to which this Court must adhere. Thus, the Court is unpersuaded by White's attempt at analogy. Because White cannot demonstrate that the Ohio Supreme Court's holding was an unreasonable interpretation of Supreme Court law, the Court finds this claim to be without merit.

Fifteenth Ground For Relief - Incomplete Record

In this ground for relief, White maintains that he was denied a fair trial and appeal because of an incomplete record. Specifically, White contends that the written requests broadcasting companies were court-ordered to file to videotape his trial were not part of the record, nor were actual videotapes. White raised this claim as his eighth proposition of law to the Ohio Supreme Court. Hence, the Court will address the merits of this claim.

The Court finds that this claim is a state claim not cognizable in a federal habeas proceeding. White supplies the Court with no law asserting that he has a federal constitutional right to a video recording of his trial. A federal habeas court may review and address only those claims involving a denial of a federal right. 28 U.S.C. § 2254.

To the exfent White is claiming that his right to the videotapes somehow pertains to his right to a fair trial or Supreme Court cogently analyzed this claim on direct appeal:

> In Proposition of Law VIII, appellant argues that the record in this case is incomplete because a videotape of the trial, which was recorded by a local television station, was not made part of the record. Essentially, appellant contends that his constitutional rights are being jeopardized because the trial court denied him a complete transcript of the proceedings, which is necessary to prosecute his appeal.
>
> This argument lacks merit. In State ex. rel. Spirko v. Court of Appeals (1986), 27 Ohio St.3d 13, 18, 27 OBR 432, 436, 501 N.E.2d 625, 629, we held that under Section 16, Article I of the Ohio Constitution, a capital defendant is entitled to a complete, full, and

> unabridged transcript of all proceedings against him. Contrary to appellant's assertion that he is entitled to the videotape recording of the proceedings, a full transcript refers to the complete written record of the trial proceedings and does not necessarily include a videotape made by a television station. Furthermore, appellant previously filed a motion with this court to order the television station to preserve and copy the videotape to be made part of the record on appeal. However, we denied this motion and continue to adhere to that position. Accordingly, appellant's eighth proposition of law is overruled.

White, 693 N.E.2d at 781-82. Because the Ohio Supreme Court's holding is not an unreasonable application of federal law, this claim is not well-taken.

Sixteenth Ground for Relief - Ineffective Assistance of Appellate Counsel

In this ground for relief, White asserts that appellate counsel were ineffective for failing to raise a list of claims on direct appeal.[19] White raised these issues in his Rule XI

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[19] Specifically, White contends that appellate counsel were ineffective for failing to raise the following claims on direct appeal:

1. The prosecutor's use of peremptory challenges to exclude potential women jurors and defense counsel's failure to object to the prosecutor's discriminatory use of peremptory challenges.

2. The excusing without cause of juror Schade because of her age and defense counsel's failure to object.

3. The failure of trial counsel to object to improper jury

instructions including but not limited to incorrect definitions and explanations by the trial court of mitigation as related to the lessening of blame; the incorrect statements that the weighing process considers whether mitigating factors outweigh aggravating circumstances; the incorrect weighing of both aggravating circumstances against the mitigating evidence; the instructing the jury to consider all other evidence relevant to the nature and circumstances of the aggravating circumstances in their weighing process; the incorrect instruction that for mitigation deliberations the verdict must be unanimous.

4. The failure of trial counsel to object to victim impact information.

5. The failure of trial counsel to object to improper, inflammatory and prejudicial arguments by the prosecutors.

6. The failure to challenge the use of the Petitioner's carrying a concealed weapon as an "aggravator" as well as other similar act evidence.

7. The failure of defense counsel to seek severance of a weapon while under disability charge which thereby allowed testimony regarding the underlying felony conviction.

8. The improper use by the prosecutor of Mrs. White's taped statement and defense counsel's failure to object to the same.

9. The failure of defense counsel to object to the improper testimony and consideration of the Petitioner's future dangerousness.

10. The seeking of a second psychological evaluation by Dr. Sunbury for use at mitigation; the failure to seek a

application to reopen to the Ohio Supreme Court, the earliest point that he could possibly assert them. The Ohio Supreme Court denied the application in a summary opinion. Because that court neither stated that the application was denied because of a procedural defect in White's claim nor specifically based its decision on a state law ground, the Court found in section VI., B., 2, *supra*, that this Court could address merits of these claims.

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey, 469* U.S. 387, 396 (1985). The two-part test enunciated in *Strickland*, discussed above, is applicable to claims of ineffective assistance of appellate counsel. Thus, White must demonstrate that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. *Strickland*, 466 U.S. at 687. An appellant has no constitutional right to have every non-frivolous issue

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limiting instruction for Sunbury's report such that it could only be used for impeachment and not substantively as evidence; the failure to object to the prosecutorial misconduct of arguing about Dr. Sunbury's report that was not in evidence and addressed the aspect of the Petitioner's sanity and competency.

11. The failure by defense counsel to argue "Brady" violations when it became apparent that the state had failed to disclose witnesses' prior statements.

12. The failure of defense counsel to ask for a lesser included charge of manslaughter.

13. The failure to challenge jury instructions that addressed issues of prior calculation and design and intoxication.

raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir.), *cart, denied*, 498 U.S. 1002 (1990). Indeed,

> [m]ost cases present only one, two, or three significant questions . . . . Usually, . . . If you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of stronger ones.

Jones, 463 U.S. at 752 (quoting R. Stern, *Appellate Practice in the United States* 266 (1981)). Moreover, an attorney is not required to present an argument on appeal for which there is not good-faith factual support, in order to avoid a charge of ineffective representation. *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986). In this case, White has not articulated, beyond bare assertion, how his counsel's judgment in not asserting the above-listed claims was objectively unreasonable. Thus, the Court finds it was not.

Further, and of equal importance, the Court also determines that White cannot establish that appellate counsel's behavior prejudiced his appeal. All claims raised in this ground for relief were raised as separate claims elsewhere in White's Petition. See grounds for relief two, three, four, five, six, seven, eight, nine, and ten, *supra*. As the Court finds that those claims lack merit, White's, ineffective assistance of counsel claims also fail because he cannot establish prejudice resulting from counsel's failure to raise the thirteen claims White lists in his Petition. Consequently, because White has asserted, and this Court has addressed and rejected all underlying claims for relief asserted in this

ground, White cannot show that any objectively unreasonable behavior was prejudicial to him. Barring such a showing, the Court finds White's sixteenth ground for relief is without merit.

Seventeenth Ground for Relief - Limitation on Right to Appeal

In this ground for relief, White contends that the Ohio legislature's elimination of one level of appellate review for capital convictions involving crimes committed after January 1, 1995, violates his due process and equal protection rights.

The Court declines to address the merits of White's claim as this is an improper forum in which to grant White relief. White fails to articulate any infringement for which a federal habeas corpus court can grant relief. *Kirby v. Dutton*, 794 F2d 245 (6th Cir. 1986). Although "the result of the habeas petition need not necessarily be reversal of the conviction . . . the petition must directly dispute the fact or duration of the [petitioner's] confinement." *Id.* at 248 (citation omitted). Even if the Court were to consider White's claim, it would not serve to directly refute or reduce White's sentence. Consequently, White's seventeenth ground for relief is not well-taken.

Eighteenth Ground for Relief - Proportionality Review

White's eighteenth ground for relief is that the Ohio appellate courts failed to provide him with a meaningful review on appeal in two respects: First, White contends that Ohio's imposition of the death penalty is not proportional, i.e., that his sentence is excessive when compared to other individuals who were sentenced to death. Second, White asserts that the Ohio legislature has created a liberty interest in the proportionality statutes with which the courts did not comply in his case. The Ohio Supreme Court addressed this

claim on direct appeal. Thus, this claim is not procedurally defaulted and the Court will address it on its merits.

Proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984). *See also McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996), *cert. denied*, 520 U.S. 1257 (1997), ("There is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review."). By statute, however, Ohio requires the appellate courts to engage in a proportionality review. Under Ohio Rev. Code § 2929.05(A):

> In determining whether the sentence of death is appropriate the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors.

Because Ohio law requires appellate courts to engage in proportionality review, the review must be consistent with constitutional requirements. *Kordenbrock v. Scroggy*, 680 F. Supp. 867, 899 (E.D. Ky. 1988) (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). Nonetheless, when the state courts have engaged in proportionality review, the district court's review is limited. The district court is to examine the state's proportionality review only to determine whether the imposition of death on the petitioner is patently unjust or "shocks the conscience; the court is not to second-guess the

state court's comparison of other cases in which the death penalty was imposed." *Id.* (citing *Moore v. Balkcom*, 716 F.2d 1511, 1517 (11th Cir. 1983)). *See also Spinkellink v. Wainwright*, 578 F.2d 582, 604 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (same).

In *Spinkellink*, the petitioner argued

> that his crime, when compared to other Florida death penalty cases, was insufficiently gruesome or heinous to warrant the death penalty and had highlighted seven other cases in which the Florida Supreme Court had reversed death sentences. All of these other cases allegedly involved defendants equally or more deserving of the death penalty than he.

Moore, 716 F.2d at 1517-18 (citing *Spinkellink*). The court "condemned a federal case by case analysis of the cases used by the state appellate court in its proportionality review as an unnecessary intrusion on the [state] judicial system." *Id.* (citing *Spinkellink*).

> A federal habeas court should not undertake a review of the state supreme court's proportionality review and, in effect, 'get out the record' to see if the state court's findings of fact, their conclusions based on a review of similar cases, was supported by the 'evidence' in the similar cases. To do so would thrust the federal judiciary into the substantive policy making area of the state.

Id. Moreover, the Sixth Circuit in a recent opinion stated that because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, No. 95-02415, 2001 WL 1529624, at *24 (6th Cir. Dec. 4, 2001).

The Ohio Supreme Court's detailed proportionality analysis effectively refutes any argument that White was denied a meaningful proportionality review. Its opinion on this issue is set forth below in full:

INDEPENDENT REVIEW AND PROPORTIONALITY

After independent assessment, we find that the evidence supports the aggravating circumstances that appellant murdered a peace officer who he knew or had reasonable cause to know was engaged in his duties as a peace officer (R.C. 2929.04(A)(6) and that he killed Trooper Gross to escape detection or apprehension for another offense. R.C. 2929.04(A)(3). We now weigh the facts and evidence in the record to determine whether the aggravating circumstances of which appellant was convicted outweigh the mitigating factors beyond a reasonable doubt.

We find that the nature and circumstances of the offense are in no way mitigating. On the evening of January 18, 1996, appellant skipped work and went out drinking. Hours later, he returned home, was belligerent toward his mother; and damaged property in her home. He pointed a gun at his mother and sister and ordered them to pack his personal belongings. Fearing that the police would be called, he tore the phones off the wall and then tied up his mother and sister. Before leaving, appellant fired a gun at his mother, wounding her just above the ankle. Then, following reports of erratic driving along Interstate 71, Trooper Gross pulled appellant's vehicle to the berm of the highway. Witnesses saw appellant fire at least two shots at Trooper Gross. The shot that killed Trooper Gross hit him in the back as he tried to escape from appellant. We find nothing in the nature and circumstances of this

crime to be mitigating.

Appellant's history, character, and background provide some mitigating weight. Appellant grew up on a family farm, the oldest of two children. He was involved with 4-H and church activities. As a child, he often played alone and read frequently. One teacher questioned his attention span; however, subsequent tests revealed that he was very intelligent and had a long attention span. During high school, he worked at a grocery store. Following high school, he joined the Navy. However, he abused alcohol and drugs, was disciplined in three nonjudicial proceedings, and was ultimately let go from the Navy with a less than honorable discharge. Appellant later worked at the Kroger distribution warehouse. As an adult, appellant continuously had problems with alcohol abuse. He attended Alcoholics Anonymous and Interact Behavioral Health Care, but could not stop drinking. There was also evidence that his father may have been abusive or hard on him as he was growing up, which is entitled to some weight. Additionally, appellant had told some witnesses that he had lost a wife or girlfriend in an automobile accident while stationed in Hawaii. However, the state refuted this allegation. Even if true, it is entitled to little mitigating weight.

With respect to the statutory mitigating features, very few are present.

Under R.C. 2929.04(B)(3), we are to take into account the factor of whether, at the time the offense was committed, the appellant suffered from a mental defect causing him to lack substantial capacity to appreciate the criminality of his conductor to conform his conduct to the requirements of the law. Appellant was said to have suffered from two types of psychiatric disorders: a

dysthymic disorder, which is a persistent form of depression, and substance abuse. Appellant did not claim that these mental diseases or defects met the criteria of R.C. 2929.04(B)(3). We give them only modest weight in mitigation under R.C. 2929.04(B)(7). See State v. Brooks, (1986), 25 Ohio St.3d 144, 155-56, 25 OBR 190, 200, 495 N.E.2d 407, 417.

As to R.C. 2929.04(B)(5), appellant had a previous conviction for carrying a concealed weapon in 1995 and was placed on probation for that crime. Since there is not an absence of a criminal record, this factor does not weigh in appellant's favor.

Under the catchall provision of R.C. 2929.04(B)(7), appellant's alcohol and drug abuse problems are entitled to some mitigating weight. See State v. Green, (1993), 66 Ohio St.3d 141, 153, 609 N.E.2d 1253, 1263. Appellant's intoxication at the time the murder was committed is also given slight weight in mitigation. However, appellant's predisposition toward disliking police as well as his actions prior to the murder reduce the weight ascribed to this factor. Appellant's remorse is also entitled to some weight under this subsection. However, there are no other relevant statutory mitigating factors to consider.

Based upon the foregoing, and upon weighing the aggravating circumstances against the mitigating factors, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Appellant's actions in committing a murder of a peace officer fulfilled the threats that he had expressed to others that "something would happen" to the next officer who pulled him over. His actions merit the

> capital penalty to which he was sentenced. We conclude that the death penalty in this case is appropriate and proportionate when compared with capital cases involving the murder of a peace officer (State v. Glenn, [1986], 28 Ohio St.3d 451, 28 OBR 501, 504 N.E.2d 701) and murder to escape detection, apprehension, trial , or punishment for another offense. (State v. Burke, [1995], 73 Ohio St.3d 399, 653 N.E.2d 242.)

White, 693 N.E.2d at 782-83.

The Ohio Supreme Court's analysis satisfied its obligation under Ohio Rev. Code § 2929.05(A) and the United States Constitution. The Court agrees with the Ohio Supreme Court that White fulfilled his forewarning that "something would happen" to the next police officer who pulled him over when he killed Trooper Gross. Accordingly, imposition of the death penalty is not patently unjust and does not "shock the conscience."

Finally, the Court disagrees with White's contention that the Ohio legislature has created, and the Sixth Circuit has implicitly recognized, a liberty interest in its death penalty statutes. Although the Sixth Circuit has explicitly rejected this argument in a case concerning the Tennessee death penalty statutes, *Coe v. Bell*, 161 F.3d 320, 351-52 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999), White attempts to buttress his claim by noting the distinctions between Ohio's death penalty scheme and Tennessee's. In a recent Sixth Circuit case, however, that court summarily determined that an Ohio petitioner "has no Eighth Amendment right to proportionality review." *Greer v. Mitchell*, - F.3d - , 2001 WL 1001080, at *22 (6th Cir. Sept. 4, 2001). Thus, this claim has no merit.

Because White received a constitutionally sufficient

proportionality review, his eighteenth ground for relief is not well-taken.

Nineteenth Ground for Relief

In his nineteenth ground for relief, White contends his death sentence should be vacated because the death penalty violates international law and the United States Constitution. Pursuant to the Supremacy Clause of Article VI, White argues, judges are bound by the terms of international treaties to which the United States is a party. White claims that he has been denied rights under the American Declaration of Rights and Duties of Man, applicable to the State of Ohio through the Supremacy Clause, because the death penalty is imposed in an arbitrary manner. White asserts the death penalty is arbitrary because the jury system excluded jurors who conscientiously object to the death penalty. Thus, White concludes, the jurors are predisposed to sentence a defendant to death. White raised this claim as his fourteenth proposition of law to the Ohio Supreme Court, which rejected the claim without opinion. The Court finds, therefore, that this claim has not been procedurally defaulted. The court will independently analyze this claim, then subject it to a reasonableness review.

The Court finds persuasive the reasoning in *Celestine v. Butler*, 823 F.2d 74 (5th Cir. 1987), *cert. denied*, 483 U.S. 1036 (1987). In *Celestine*, the petitioner, alleging racial discrimination, claimed that treaties of which the United States was a signatory superseded Louisiana law under the Supremacy Clause. The court held, "how these issues are to be determined is settled under American constitutional law," *Id.* at 79-80. Like Celestine, White has not set forth a single argument directed at showing that the United States, via these international agreements, assented to provide additional factors for the decision to impose the death penalty or to modify the decisional factors required by the United States

Constitution as interpreted by the Supreme Court. *Id.* at 80. Also persuasive is the fact that since the reinstatement of the death penalty in *Gregg v. Georgia*, 429 U.S. 875 (1976), the Supreme Court has never relied on these international agreements to find a death penalty unconstitutional. *See also State v. Steffen*, No. C-930351, 1994 WL 176906, at 4 (Ohio Ct. App. May 11, 1994) (holding that there was no colorable argument supported by precedent from any human rights forum that the arrest, incarceration, trial, and sentence of an individual violated human norms to which the United States is bound either by customary international law or treaty). Accordingly, White's nineteenth ground for relief is not well-taken. It is, in fact, a total waste of this Court's time again.

Twentieth Ground for Relief - Electrocution is Cruel and Unusual Punishment

In this ground for relief, White contends that execution via electrocution constitutes cruel and unusual punishment in violation of the Eighth Amendment. White raised this claim on direct appeal to the Ohio Supreme Court as his fifteenth proposition of law. Thus, the Court will address the merits of this claim. This time-worn argument lacks merit. As the Sixth Circuit recently stated, "[n]ot only has the constitutionality of electrocution been consistently upheld, *In re Keinmler*, 146 U.S. 536, 10 S. Ct. 930, 34 L. Ed. 519 (1690), but Ohio allows for the choice of lethal injection." *Greer v. Mitchell*, - F.3d - , 2001 WL 1001080, at *23 (6th Cir. Sept. 4, 2001). Moreover, the State of Ohio has now eliminated electrocution. Am. H.B. 362, 124th Gen. Assem., Reg. Sess. (Ohio 2001) (enacted). Thus, White's twentieth ground for relief is not well-taken.

Twenty-first Ground for Relief - Unconstitutionality of the Death Penalty Statute

In his final ground for relief, White alleges that various

aspects of Ohio's death penalty statute render it unconstitutional. Respondent does not address this claim in her Return of Writ or Sur-Reply. Because Respondent fails to allege procedural default, the Court will address this claim on the merits.

In this claim, White alleges essentially twelve grounds on which this Court should determine the Ohio death penalty statutes are unconstitutional. The Court is not swayed by any of White's allegations. The Court will list each of White's sub-claims below in italics, and, thereafter will address each claim in summary fashion.

- *Ohio's scheme is unconstitutional because it imposes the death penalty in a racially discriminatory manner.* According to *McClesky v. Kemp*, 481 U.S. 279 (1987), a capital defendant cannot evade a death sentence merely by demonstrating the statistical disparity of capital defendants of a particular race. Instead, a capital defendant must prove that the decision-maker in his or her individual case acted with a discriminatory purpose, and that such actions had a discriminatory effect on the proceeding. *Id.* at 292. White has made no such showing in his case.

- *Ohio's scheme is unconstitutional because it provides for a bifurcated system in which the identical jurors find for guilt and later sentence the defendant. This use of the jury places the defendant at a tactical disadvantage.*[20] White points to no authority that would hold this provision of the Ohio death penalty constitutionally infirm. Furthermore, the bifurcated system long has been

[20] White asserts that bifurcation is disadvantageous to a criminal defendant because if counsel argues a defense that the jury rejects during the guilt phase, counsel then loses credibility for the sentencing phase of trial.

credited as a system having the desired effect of narrowing the class of death-eligible defendants. *Lockett v. Ohio*, 438 U.S. 586 (1978), and if Ohio did not have a bifurcated system White would undoubtedly claim *that* as a constitutional defect.

- *Ohio's scheme is unconstitutional because it fails to provide the jury with adequate guidelines for balancing aggravating circumstances against the mitigating factors.* Once again, White cannot point to any authority that would render these guidelines unconstitutional.

- *Ohio's scheme is unconstitutional because it pressures a capital defendant into pleading guilty rather than exercising their right to trial.* In *United States v. Jackson*, 390 U.S. 570, 582 (1996), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to demand a jury trial. In that case, the Court struck down the capital portions of a federal kidnapping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial." *State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986). Consequently, Ohio's scheme comports with constitutional mandates.

- *Ohio's scheme is unconstitutional because it provides an inadequate proportionality review.* This argument was raised and addressed in White's eighteenth ground for relief. The Court will not readdress it here.

- *Ohio's scheme does not provide for an adequate re-weighing of the aggravating circumstances and mitigating factors on appeal.* Other than bare assertion, White cannot demonstrate that Ohio courts generally, or

in his case in particular, do not adequately re-weigh the aggravating circumstances with the mitigating factors. Moreover, White raised this claim in his seventeenth ground for relief, *supra.* The Court will not readdress it here.

- *Ohio's scheme is unconstitutional because it precludes the jury from considering mercy.* The Supreme Court rejected a similar argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

- *Ohio's scheme is unconstitutional because the jury is not permitted to consider the appropriateness of the sentence.* No such constitutional mandate exists. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal.

- *Ohio's scheme is unconstitutional because it fails to require the jury to find a conscious desire to kill or specific intent to kill.* This argument is groundless as §2903.01(E) requires no person to be convicted of aggravated murder unless he or she is "specifically found to have intended to cause the death of another . . ." Moreover, the Supreme Court sanctioned the use of a criminal state of mind less culpable than intent, i.e., reckless indifference, as an acceptable level of culpability to impose the death penalty. *See Tison v. Arizona*, 481 U.S. 137, 156 (1986) (affirming death sentence of capital defendant who took part in prison escape but was not present when murder of kidnapped family occurred because he possessed a "reckless disregard for human life.").

- *Ohio's scheme is unconstitutional because it fails to require proof beyond all doubt.* The Supreme Court explicitly rejected this argument in *In re Winship*, 397 U.S. 358, 364 (1970) where it stated that the standard

required to convict a criminal defendant is "proof beyond a reasonable doubt."

- *Ohio's scheme is unconstitutional because one of the aggravating circumstances merely repeats an element of the crime and fails to narrow the class* of *death-eligible defendants.* The Supreme Court has articulated clearly the constitutional mandates for imposing the death penalty. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held that any death penalty statute must allow the sentencer to review all mitigating evidence during the penalty phase, thereby fashioning a sentence befitting the individual defendant. Because death "is so profoundly different from all other penalties," the Court reasoned, it cannot be imposed without individualizing the sentence. *Id.* at 605. The Court further refined the statutory limiting requirement in *Zant v. Stephens*, 462 U.S. 862 (1983). In that case, the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. *Id.* at 177. Specifically, a state may choose either to legislatively limit the definition of death- eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating circumstances during the penalty phase. *Lowenfeld v. Phelps*, 484 U.S. 231, 246 (1987)

Ohio's death penalty scheme complies with these mandates. First, § § 2929.04(B) and (C) allow the defendant to present, and the fact finder to consider, all statutorily enumerated mitigating factors. Moreover, § 2929.04(B)(7) permits a fact finder to consider all mitigating factors in addition to those enumerated in the statute. Finally, the Ohio death penalty scheme satisfies the *Zant* requirements by demanding the fact finder to find the existence of at least one aggravating circumstance set forth in § 2929.04(A).

- *Ohio's scheme is unconstitutional because it fails to properly allocate the burden of proof in the mitigation phase.* As discussed above Ohio's scheme meets the constitutional requirements of both considering all mitigating evidence and sufficiently tailoring the sentence to the individual defendant.

VIII. CONCLUSION

The Court now must determine whether to grant a Certificate of Appealability (hereinafter "COA") for any of White's claims. In two recent decisions, the Sixth Circuit has determined that neither a blanket grant or denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine(s) the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, this Court now must consider whether to grant a COA as to any of the claims White presented in his Petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part;

* * *

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a constitutional right, rather than the federal right that was required prior to the AEDPA's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of that statute in *Slack v. McDaniel*, 529 U.S. 473 (2000) . In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined that

> "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"

Id. at 483-4 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on to distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim 'is not

procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis supplied).

After taking the above standard into consideration, the Court finds that two issues merit further review. Neither issue is procedurally defaulted. Thus, the Court need only determine whether reasonable jurists would debate this Court's decision on the merits of the claim. First, the Court finds that a reasonable jurist might conclude that Juror Susanne Sheppard's equivocation regarding White's guilt impeded her ability to impartially judge White. As stated above, a reviewing court must determine "whether [the trial court's] findings are supported by the record." *Wainwright v. Witt*, 469 U.S. 412, 434 (1985) Thus, a reviewing court must undertake an independent review of the record when determining whether the trial court's decision to include or exclude a juror was proper. While this Court believes that its independent review of the record supports the trial court's conclusion to permit Juror Sheppard to serve on the jury, a reasonable jurist might find otherwise. Consequently, the Court GRANTS a COA as to White's first ground for relief only on the question of Juror Sheppard's ability to be fair and impartial. The Court DENIES a COA as to the other sub-claims in the first ground.

Second, the Court grants a COA as to White's prosecutorial misconduct claim only as it pertains to the "prosecutorial theatrics" White asserts the state exhibited in

the courtroom. Although this Court finds that, when considering the prosecutors' actions as a whole they did not "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process,'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642 (1974)), particularly because White's trial strategy was to admit guilt but plead intoxication, the Court does find the alleged prosecutorial actions atypical. For that reason, the Court finds that a reasonable jurist might find this alleged behavior could have influenced the jury. Thus, the Court GRANTS a COA on the second ground for relief as it pertains to "prosecutorial theatrics" only.

The Court finds no other claims to be debatable among jurists of reason as no other ground for relief comes even marginally close to presenting a federal constitutional or legal violation. In many instances throughout the Petition, counsel have misstated either law or fact to bolster a claim. Thus, upon reviewing the record or cases Petitioner cites, the Court finds the "support" actually undercuts the claim. Moreover, many claims involve time-worn legal arguments that this Court as well as established precedent have found to be without merit. Consequently, the Court DENIES a COA as to all other claims presented in this Opinion.

IX. PENDING MOTIONS TO CONDUCT DISCOVERY

The Court notes that currently there are two pending motions by White to conduct discovery. The Court previously has stated the standard for granting discovery pursuant to Rule 7 of the Rules Governing Section 2254 Cases in its prior discovery orders. The Court repeats that standard here:

A habeas petitioner is entitled to discovery if "the judge in the exercise of his discretion and for good cause shown

grants leave to do so, but not otherwise." R. Governing Section 2254 Cases 6(a). The "good cause" standard set forth in Rule 6 restrains a habeas petitioner from unbridled entitlement to discovery. "At the very least, it is clear that there was no intention to extend to habeas corpus, as a matter of right, the broad discovery [afforded in] ordinary civil litigation." *Harris v. Nelson*, 394 U.S. 286, 295 (1969) (citation omitted); *see also Lynott v. Story*, 929 F.2d 228 (6th Cir. 1991) (following *Harris*). To demonstrate "good cause," a habeas petitioner must state a specific allegation that, if fully developed, would entitle the petitioner to relief. *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) Rule 7 permits a habeas court to require the production of any documents "relevant to the determination of the merits of the petition." R. Governing section 2254 Cases 7(a).

As is demonstrated by the above Opinion, the Court requires no additional discovery or information to render its opinion. Accordingly, the Court DENIES, as unnecessary, White's Motion to Reconsider Leave to Conduct Discovery and Expert Assistance Relating to His Eighteenth and Twenty-First Claims (Doc. No. 135), and Request for Discovery Relating to His Fifteenth, Sixteenth, and Twenty-First Claims (Doc. No. 137)

IT IS SO ORDERED.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

The Clerk of Court shall send a copy of this Memorandum of Opinion to Alan C. Rossman, Esq.,75 Public Square, Ste. 1325, Cleveland, OH 44113; Michael J. Benza, Esq., Law Office Of Jeffry F. Kelleher, 1540 Leader Bldg., 526 Superior Avenue, Cleveland, OH 44114; Henry G. Appel, Esq., Office Of The Attorney General, Capital Crimes Section,30 East Broad Street,20th Floor, Columbus, OH 43215-3425.

APPENDIX D

The State Of Ohio, Appellee,
v.
White, Appellant.

Nos. 96-2029, 96-2509

Supreme Court Of Ohio

82 Ohio St. 3d 16; 1998 Ohio 363; 693 N.E.2d 772

May 20, 1998, Decided

This appeal stems from the shooting death of Ohio Highway Patrol Trooper James Gross. Defendant-appellant, Maxwell D. White, Jr., was convicted of aggravated murder with death penalty specifications under *R.C. 2929.04(A)(6)* (killing a peace officer) and *R.C. 2929.04(A)(3)* (offense committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense). Appellant was also convicted of having a weapon while under a disability, and abduction. The facts leading to this tragic death are as follows.

At around 5:00 p.m., on January 18, 1996, appellant arrived at the condominium he shared with his mother and told her he was taking the night off from his job at the Kroger's warehouse. Appellant left with his pool cue and returned home close to midnight. Appellant was drunk and asked to be left alone. His mother went upstairs, hoping that appellant would pass out. She confronted appellant when the noise continued, and warned him that someone might call the police if he did not quiet down. Appellant became more agitated and screamed obscenities at his mother. Appellant

feared the police because he was on probation for carrying a concealed weapon and believed the police had harassed him in the past and had singled him out. He told his mother that he could not go to jail and that he would rather go to the morgue than go to prison.

His mother went back upstairs to her bedroom, called her daughter, Dorothy ("Dotty"), and told her how appellant was acting. When appellant learned that his mother was on the phone, he pulled all the phones off the wall and told his mother not to call the police.

Appellant then retrieved a gun from the gun cabinet and, after Dotty arrived at the condominium, appellant ordered his mother and sister to pack his duffel bags and fill one bag with his clothes and another with guns from his late father's gun collection. Appellant explained that he wanted to go live in the woods. He broke the glass to the entertainment center and took out the radio. Appellant used a jump rope to tie his mother and sister to a pole. As appellant fumbled with a clip for the gun he was holding, he fired a shot and wounded his mother just above the right ankle. Appellant left the condominium. Dotty untied herself and her mother and called for help.

In the early morning hours of January 19, 1996, a UPS driver and a truck-driving couple who were heading north on I-71 heard CB reports of a brown four-door car driving erratically on the highway. At that time, Trooper Gross was temporarily filling in for the dispatcher (who was on break) at the Ashland post of the State Highway Patrol. At 3:10 a.m., Gross received a CB report regarding the brown car. Gross left the dispatching area to respond to the call. The truck drivers saw Gross's State Highway Patrol car enter I-71 at milepost 186. They radioed the officer a description of the brown car. As Gross followed the car for about four miles, the driver "straightened up" his driving.

At milepost 190, Gross pulled the car over and reported the license plate to the dispatcher. The dispatcher advised Gross that the car was registered to appellant and that appellant did not have driving privileges. The two truck drivers, Jeffrey and Susan Erickson, saw Gross step out of his vehicle, approach appellant's car and lean toward the driver's side car door to talk to appellant. Mrs. Erickson then saw a flame and heard a pop. Mr. Erickson observed Gross spin around and begin to fall as he tried to run back to his cruiser. Gross slipped and fell. Appellant leaned out of his cracked-open driver's side door and fired shots at the officer's back. Mrs. Erickson heard two more pops and saw two flashes. Her husband testified that the trooper "didn't have a chance" to pull out his weapon in response. Appellant sped away and continued north on I-71.

At approximately 3:15 a.m., the truck drivers radioed on their CB that an officer had been shot. They communicated with another truck driver ahead and told the driver to try to push appellant's car off the road. The truck driver attempted to do this, and forced appellant's car into the median, causing it to fishtail. However, appellant was able to regain control over his vehicle. A high-speed chase ensued, with several different law enforcement agencies joining in pursuit of appellant at speeds over one hundred miles per hour. Eventually, appellant crashed his vehicle into a concrete drainage culvert near the State Route 18 exit of I-71 northbound. Police apprehended appellant without further incident. From the front floorboard of his car, police retrieved a Smith & Wesson semiautomatic pistol with an empty clip. Appellant was taken to the hospital for injuries he had sustained, and was later confined to jail.

In the meantime, the UPS driver, who had been following Gross, and a deputy sheriff from the Ashland County Sheriff's Department stopped at milepost 190 and found Gross lying on his stomach directly behind his cruiser. Gross's weapon was in his holster and a flashlight he had

carried was lying underneath the cruiser. The sheriff found no pulse and attempted mouth-to-mouth resuscitation and CPR on Gross, with the UPS driver's help. However, they were unsuccessful.

The forensic pathologist who performed the autopsy on Gross testified that Trooper Gross had sustained two gunshot wounds. The gunshot wound to his left arm was consistent with a defensive wound, and resulted in three fractures. The other gunshot wound entered Gross's right back just below his bullet-proof vest. As a result, Gross sustained multiple perforations of his internal organs, including the right ventricle of the heart, which caused his death. The pathologist testified that, at the most, Gross lived only four minutes after the bullet entered his lower back.

Friends and co-workers of appellant also testified at trial on behalf of the state. Their testimony consistently portrayed appellant as a person who disliked law enforcement officers and felt harassed by them. Following his arrest for carrying a concealed weapon in 1995, appellant told co-workers that he would "cap the ass" of (shoot) the next police officer who stopped him. He also said that "something would happen" if a policeman ever pulled him over again.

The defense rested without calling any witnesses. After deliberation, the jury found appellant guilty as charged.

At the mitigation hearing, several witnesses testified on appellant's behalf, including a clinical psychologist and a chemical-dependency counselor from Interact Behavioral Health Care Services, where appellant had received outpatient services for his alcohol abuse. Co-workers and family members also testified. Their testimony revealed that appellant grew up on a farm and was above average in his intelligence. He was involved in 4-H and worked at a grocery store in high school. Over the years, appellant had difficulty in school and with authority figures. As an adult, appellant went into the Navy but received a less than honorable

discharge. It was widely acknowledged that appellant had a serious drinking problem and had attended Alcoholics Anonymous meetings and outpatient counseling, but was unsuccessful in his attempt to stop drinking. There was also testimony that his deceased father had been critical of him.

According to the psychologist hired by appellant, appellant suffers from substance dependency (primarily alcohol, but also marijuana) and from dysthymic disorder, a form of depression. He also stated that appellant had a dysfunctional family and that his father was abusive.

Appellant gave an unsworn statement and apologized to Trooper Gross's widow and family. Appellant accepted responsibility for his actions and asked the jury to spare his life.

The state presented several witnesses at the sentencing hearing. Gross's widow and mother expressed their grief over the loss of the decedent. Friends and co-workers described appellant as argumentative and defiant to authority figures at work, but did not characterize him as depressed. One co-worker testified that appellant had threatened him while at work.

After considering this mitigation evidence, the jury recommended that appellant be sentenced to death. The trial court imposed the death sentence for the aggravated murder of Trooper Gross and sentenced appellant to consecutive prison sentences for his other convictions. Appellant filed an appeal with the court of appeals. This appeal was dismissed for want of jurisdiction. He appealed the dismissal to this court. (Case No. 96-2509.) Appellant also filed an appeal directly to this court (case No. 96-2029), and the appeals were consolidated.

The cause is now before this court upon an appeal as of right and a claimed appeal as of right.

Judgment affirmed in case No. 96-2029. Dismissal of appeal affirmed in case No. 96-2509.

FRANCIS E. SWEENEY, SR., J. Appellant raises fifteen propositions of law for our consideration. (See Appendix.) We have carefully considered each of these propositions of law, but adhere to our position that we need not separately address all propositions of law in opinion form. See *State v. Poindexter (1988), 36 Ohio St. 3d 1, 3, 520 N.E.2d 568, 570; State v. Scudder (1994), 71 Ohio St. 3d 263, 643 N.E.2d 524.* Therefore, we summarily dispose of those propositions of law where the error was not properly preserved or where the issues raised have previously been addressed by this court but rejected. We have also reviewed the death sentence for appropriateness and proportionality. For the reasons that follow, we affirm the judgment of the trial court and uphold the convictions and sentence of death.

I

ALLEGED JUROR BIAS

In his first proposition of law, appellant argues that the trial court erred in failing to excuse a juror for cause where that juror expressed concern over whether she was able to be impartial to the appellant. Appellant points out that *R.C. 2313.43* requires jurors to be "entirely unbiased," and asserts that the voir dire of this juror did not meet this standard.

R.C. 2313.43 provides that when a juror is challenged on suspicion of being prejudiced or partial to either party, "the validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased." We have previously held that a trial court has broad discretion in determining a juror's ability to be impartial. *State v. Williams (1983), 6 Ohio St. 3d 281, 288, 6 Ohio B. Rep. 345, 351, 452 N.E.2d 1323, 1331.* Thus,

where a prospective juror is being challenged for bias, "deference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt (1985), 469 U.S. 412, 426, 105 S. Ct. 844, 853, 83 L. Ed. 2d 841, 853.* A decision on a challenge to a prospective juror regarding his or her fairness and impartiality constitutes reversible error only when the trial court is shown to have abused its discretion. *State v. Wilson (1972), 29 Ohio St. 2d 203, 211, 58 Ohio Op. 2d 409, 414, 280 N.E.2d 915, 920.*

In deciding whether to exclude a juror for cause, the court must determine whether the prospective juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas (1980), 448 U.S. 38, 45, 100 S. Ct. 2521, 2526, 65 L. Ed. 2d 581, 589.* Thus, the United States Supreme Court has held that jurors who are opposed to the death penalty in every case and are unable to follow the law should be disqualified. However, in *State v. Williams (1997), 79 Ohio St. 3d 1, 6, 679 N.E.2d 646, 653,* we recognized that during voir dire in death penalty cases, prospective jurors often struggle with their personal beliefs concerning the death penalty. In these situations, it is the role of the trial judge to sort through the responses of prospective jurors to determine whether these individuals can follow the law.

In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs, we find that the trial

court did not abuse its discretion in overruling appellant's challenge for cause.

In Proposition of Law VII, appellant argues that due to the extraordinary pretrial publicity in this case, it can be presumed that the jury was biased and that he was denied a fair trial. He also contends that the voir dire inadequately addressed the issue of pretrial publicity.

It is rare for a court to presume that a jury is prejudiced by pretrial publicity. *State v. Lundgren (1995), 73 Ohio St. 3d 474, 479, 653 N.E.2d 304, 313.* Moreover, the fact that prospective jurors have been exposed to pretrial publicity does not, in and of itself, demonstrate prejudice. "Pretrial publicity -- even pervasive, adverse publicity -- does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart (1976), 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L. Ed. 2d 683, 695.* Therefore, if "the record on *voir dire* establishes that prospective veniremen have been exposed to pretrial publicity but affirmed they would judge the defendant solely on the law and the evidence presented at trial, it is not error to empanel such veniremen." *State v. Maurer (1984), 15 Ohio St. 3d 239, 252, 15 Ohio B. Rep. 379, 390, 473 N.E.2d 768, 781; State v. Carter (1995), 72 Ohio St. 3d 545, 556, 651 N.E.2d 965, 976.* In *State v. Bayless (1976), 48 Ohio St. 2d 73, 98, 2 Ohio Op. 3d 249, 262, 357 N.E.2d 1035, 1051,* we stated that "a careful and searching *voir dire* provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality."

Contrary to appellant's assertions that the voir dire was inadequate, the record reveals that the contrary is true. The voir dire in this case was not cursory. It covered three days and four hundred fifty pages of transcript. The trial court asked prospective jurors questions about whether they had read about the murder or heard about it on radio or television. Several prospective jurors were familiar with the case. The

court, as well as counsel for both sides, questioned those who indicated that they could not be fair and impartial to appellant. Following this in-depth questioning, the court excluded several prospective jurors who still felt that they could not be impartial due to the pretrial publicity. Appellant has not proven that the jury was prejudiced by pretrial publicity. Nor was the voir dire inadequate in this case. Consequently, we overrule this proposition of law.

II

PROSECUTORIAL MISCONDUCT

In his second proposition of law, appellant alleges four areas of prosecutorial misconduct: (1) using "prosecutorial theatrics" to receive an emotional response from the jury; (2) presenting graphic details of the shooting and using irrelevant evidence to portray appellant as a bad person; (3) during the guilt phase closing arguments, making several inflammatory and derogatory remarks about appellant, commenting on the nature and circumstances of the crime, and expressing opinions about his character; and (4) during the penalty phase closing arguments, improperly remarking about appellant's unsworn statement and evoking sympathy from the jury when arguing for the death penalty.

The test for prosecutorial misconduct in closing argument is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Smith (1984), 14 Ohio St. 3d 13, 14, 14 Ohio B. Rep. 317, 318, 470 N.E.2d 883, 885.* Since defense counsel failed to object to the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error. *State v. Slagle (1992), 65 Ohio St. 3d 597, 604, 605 N.E.2d 916, 925.* We will review these allegations under the plain error standard.

Under the heading of "prosecutorial theatrics," appellant points to the following and alleges error: displaying a large photograph of Trooper Gross in uniform, on an easel, in full view of the jury; hanging Trooper Gross's blood-soaked and tattered uniform on the witness stand; and demonstrating disgust toward appellant by using latex gloves to handle appellant's clothing. None of these examples is reflected in the transcript, and, according to appellant, the trial court overruled appellant's motion to correct the record. Under this heading, we find no plain error.

We also find no plain error with the way in which the prosecutor had witnesses describe their attempts to revive Trooper Gross. The witnesses' testimony, even when graphic, was relevant to describing the murder and its aftermath. The fact that an emotional response was elicited by one witness (who said, "Hang on buddy" as he tried to revive the trooper) does not show prosecutorial misconduct. Nor was it improper to have a witness state that the term "cap" was used by gang members. The witness was defining the term as used by appellant, and it is proper for the witness to explain how he was familiar with it. The testimony was relevant, and the term "cap" needed to be defined. As to allegations that the prosecutor appealed to the jurors' sympathy by referring to the way Trooper Gross looked before and after his death and by commenting on appellant's "grim reaper" tattoo and longer hair and goatee, none of these alleged acts of misconduct individually or collectively was outcome-determinative. *State v. Long (1978), 53 Ohio St. 2d 91, 96-97, 7 Ohio Op. 3d 178, 181, 372 N.E.2d 804, 807-808.*

Appellant also alleges that the prosecutor made misstatements about his character during the guilt phase closing argument. For instance, appellant states that it was improper for the prosecutor to say that appellant "hated" the police and to call him a "coward." He also says it was prejudicial for the prosecutor to comment on his lack of

expression when his mother testified. Again, under a plain-error analysis, we find no error requiring reversal. The evidence shows that appellant strongly disliked the police. Therefore, the prosecutor's statement that appellant hated the police was within acceptable latitude. Furthermore, calling appellant a coward is consistent with the evidence that appellant shot the trooper in the back. This remark is tame compared to comments we have allowed describing other defendants in capital cases. See, *e.g.*, *State v. Brown (1988), 38 Ohio St. 3d 305, 316-317, 528 N.E.2d 523, 538* (where defendant was called a monster); *State v. Beuke (1988), 38 Ohio St. 3d 29, 33, 526 N.E.2d 274, 280* (where defendant was referred to as a cancer requiring removal).

Finally, appellant argues that the prosecutor made impermissible comments on appellant's unsworn statement during the sentencing phase closing argument. In *State v. DePew (1988), 38 Ohio St. 3d 275, 285, 528 N.E.2d 542, 554,* we stated that a prosecutor's comment on the lack of an oath or affirmation should be limited to pointing out that the defendant's statement has not been made under oath or affirmation. In this case, the prosecutor said to the jury, "When [the appellant] gave his unsworn testimony, he did not give you the respect of explaining it to you." Even if this comment went beyond the permissible limits set forth in *DePew*, we find that this remark does not rise to plain error, given the weight of the aggravating circumstances in relation to the mitigating factors. *State v. Lorraine (1993), 66 Ohio St. 3d 414, 419, 613 N.E.2d 212, 218.* Other remarks, even those used to evoke passion (for example, that appellant "tore the heart out of a family"), were also within the permissible scope of closing argument. We have previously held that both parties are entitled to wide latitude during closing arguments. *State v. Brown (1988), 38 Ohio St. 3d 305, 317, 528 N.E.2d 523, 538.* We find no plain error in any of the statements cited.

None of the instances of alleged wrongdoing constitutes prejudicial prosecutorial misconduct. Appellant's second proposition of law is overruled.

III

INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation was deficient and that he was prejudiced by that deficient performance. *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693.* To establish prejudice, the defendant must show that "there exists a reasonable probability that, were it not for counsel's errors, the result of trial would have been different." *State v. Bradley (1989), 42 Ohio St. 3d 136, 538 N.E.2d 373,* paragraph three of the syllabus.

Appellant claims that his trial attorneys were defective because they elicited and allowed testimony regarding his past bad acts. For instance, during the cross-examination of his co-workers, appellant points out that defense counsel elicited responses that appellant had threatened one of them with a gun. The jury had already heard critical evidence that appellant had threatened to shoot the next police officer that stopped him, evidence used to show prior calculation and design. Defense counsel was apparently trying to lessen the blow of this evidence by showing that although appellant had threatened a co-worker, nothing had come of it and that the witnesses and appellant remained friends. Defense counsel later argued that the threat to police officers was an idle threat, and not evidence of prior calculation and design. This defense strategy was sound and did not amount to ineffective assistance of counsel.

Appellant points to several other instances where he says trial counsel were ineffective for failing to object. For

instance, he refers to the failure to object to the autopsy photographs and other demonstrative evidence displayed before the jury, to statements made by the prosecutor during closing argument in both the guilt and sentencing phase, to irrelevant testimony by Lieutenant Robert Ferguson regarding the purpose of wearing a bulletproof vest and the dangers of patrolling the highways at night, and to testimony regarding his previous offense for carrying a concealed weapon.

Given the clear, overwhelming evidence against appellant, defense counsel were faced with a difficult task in preparing a defense. Although defense counsel should have objected in some circumstances, as we have pointed out in other propositions of law, appellant was not prejudiced by trial counsel's omissions. For instance, we recognize that defense counsel should have objected to the prosecutor's comments concerning appellant's unsworn statement, and, if appellant's assertions are valid, defense counsel should not have permitted the display of the large photograph of Trooper Gross or a display of his blood-soaked clothing. However, none of the instances raised by appellant in which counsel failed to object amount to prejudicial error. The evidence regarding his guilt was overwhelming, and counsel's errors did not change the result of the trial. *State v. Bradley, supra.*

Appellant also says that trial counsel was defective because they failed to request a change of venue due to the excessive pretrial publicity and because they did not conduct an adequate voir dire. As previously shown, the voir dire was adequate to uncover any bias or prejudice from prospective jurors. Furthermore, counsel made reasonable attempts to question jurors about their biases and whether they were effected by the pretrial publicity. Trial counsel's failure to request a change of venue is not tantamount to ineffective assistance of counsel. A change of venue is not automatically granted where there is extensive pretrial publicity. Instead,

the decision to grant a change of venue rests largely within the discretion of the trial court. *State v. Maurer (1984), 15 Ohio St. 3d 239, 250, 15 Ohio B. Rep. 379, 388-389, 473 N.E.2d 768, 780.* Even if it would have been prudent to request a change of venue, we find that the empanelled jury was not prejudiced by the pretrial publicity. Thus, there was no prejudice stemming from defense counsel's failure to make this request.

Since appellant has failed to show that he was prejudiced by defense counsel's representation, we overrule the ninth proposition of law.

IV

JURY INSTRUCTION ON INTOXICATION

In Proposition of Law III, appellant argues that he was denied a fair trial when the court erroneously instructed the jury on intoxication. Specifically, appellant challenges the instruction on two grounds: (1) it erroneously informed the jury that intoxication is not a valid defense, and (2) it never informed the jury that appellant need only prove the defense by a preponderance of the evidence.

The charge on intoxication read, in part:

"Intoxication is not an excuse for an offense. However, such evidence is admissible for the purpose of showing that the Defendant was so intoxicated that he was incapable of forming the purpose to commit the offense of aggravated murder.

"The mere fact that a Defendant is intoxicated does not make him incapable of acting with prior calculation and design.

" * * *

"If you find that by reason of intoxication the mind of the accused was in such condition that he was not capable of

forming a purpose to take the life of another with prior calculation and design, then he is not guilty of aggravated murder, as purpose is an essential element of that offense."

Contrary to appellant's assertion, the challenged instruction does not state that intoxication is not a valid defense. It simply points out that intoxication "is not an excuse for an offense" and that it can be used to negate specific intent. We have held that intoxication may be considered in determining whether the defendant was capable of forming the specific intent essential to the charged crime. See *State v. Fox (1981), 68 Ohio St. 2d 53, 55, 22 Ohio Op. 3d 259, 260, 428 N.E.2d 410, 411-412.* The challenged instruction follows this law. Moreover, we have previously held that the decision to instruct the jury on intoxication rests within the sound discretion of the trial judge and that no instruction need be given where there is insufficient proof of intoxication. *State v. Wolons (1989), 44 Ohio St. 3d 64, 541 N.E.2d 443,* paragraph two of the syllabus. The evidence in this case shows that appellant acted deliberately, and that his defense of intoxication was weak. Since the evidence of intoxication could not have supported a verdict of acquittal, the trial court could have chosen not to instruct on intoxication at all. However, even if the jury instruction given was misleading, because it did not include language regarding the burden of proof, we find that this omission does not constitute prejudicial error. We overrule this proposition of law.

V

WAIVER OF DEFENDANT'S PRESENCE

Appellant was not present at a hearing where proposed jury instructions were considered. Prior to this hearing, defense counsel advised the court that he would execute a waiver for the defendant to sign, and would make it part of the record. However, that was never done. In Proposition of

Law XI, appellant contends that his constitutional right to be present at all proceedings was violated when defense counsel waived his presence at this hearing.

We have previously held that a defendant "has a fundamental right to be present at all critical stages of his criminal trial." *State v. Hill (1995), 73 Ohio St. 3d 433, 444, 653 N.E.2d 271, 281.* However, the right to be present is not absolute. *State v. Meade (1997), 80 Ohio St. 3d 419, 421, 687 N.E.2d 278, 280.* Therefore, even if a defendant should have been present at a stage of the trial, "errors of constitutional dimension are not *ipso facto* prejudicial." *State v. Williams (1983), 6 Ohio St. 3d 281, 286, 6 Ohio B. Rep. 345, 349, 452 N.E.2d 1323, 1330.* Prejudicial error exists only where "a fair and just hearing [is] thwarted by [defendant's] absence." *Snyder v. Massachusetts (1934), 291 U.S. 97, 108, 54 S. Ct. 330, 333, 78 L. Ed. 674, 679.*

We find that appellant's absence during the hearing on proposed instructions did not deprive him of a fair trial. Accordingly, his absence and the failure of defense counsel to make a written waiver for the record were harmless beyond a reasonable doubt. *Chapman v. California (1967), 386 U.S. 18, 22, 87 S. Ct. 824, 827, 17 L. Ed. 2d 705, 709.*

VI

RIGHT TO COMPLETE TRANSCRIPT

In Proposition of Law VIII, appellant argues that the record in this case is incomplete because a videotape of the trial, which was recorded by a local television station, was not made part of the record. Essentially, appellant contends that his constitutional rights are being jeopardized because the trial court denied him a complete transcript of the proceedings, which is necessary to prosecute his appeal.

This argument lacks merit. In *State ex rel. Spirko v. Court of Appeals (1986), 27 Ohio St. 3d 13, 18, 27 Ohio B. Rep.*

432, 436, 501 N.E.2d 625, 629, we held that under Section 16, Article I of the Ohio Constitution, a capital defendant is entitled to a complete, full, and unabridged transcript of all proceedings against him. Contrary to appellant's assertion that he is entitled to the videotape recording of the proceedings, a full transcript refers to the complete written record of the trial proceedings and does not necessarily include a videotape made by a television station. Furthermore, appellant previously filed a motion with this court to order the television station to preserve and copy the videotape to be made part of the record on appeal. However, we denied this motion and continue to adhere to that position. Accordingly, appellant's eighth proposition of law is overruled.

VII

We summarily overrule Proposition of Law XIII, in which appellant attacks the new procedure for review of death-penalty cases, on the authority of *State v. Smith (1997), 80 Ohio St. 3d 89, 684 N.E.2d 668.* Case No. 96-2509 was therefore not properly filed as an appeal as of right, and we hereby dismiss it.

VIII

INDEPENDENT REVIEW AND PROPORTIONALITY

After independent assessment, we find that the evidence supports the aggravating circumstances that appellant murdered a peace officer who he knew or had reasonable cause to know was engaged in his duties as a peace officer (*R.C. 2929.04*[A][6]) and that he killed Trooper Gross to escape detection or apprehension for another offense. *R.C. 2929.04(A)(3).* We now weigh the facts and evidence in the record to determine whether the aggravating circumstances of which appellant was convicted outweigh the mitigating factors beyond a reasonable doubt.

We find that the nature and circumstances of the offense are in no way mitigating. On the evening of January 18, 1996, appellant skipped work and went out drinking. Hours later, he returned home, was belligerent toward his mother, and damaged property in her home. He pointed a gun at his mother and sister and ordered them to pack his personal belongings. Fearing that the police would be called, he tore the phones off the wall and then tied up his mother and sister. Before leaving, appellant fired a gun at his mother, wounding her just above the ankle. Then, following reports of erratic driving along Interstate 71, Trooper Gross pulled appellant's vehicle to the berm of the highway. Witnesses saw appellant fire at least two shots at Trooper Gross. The shot that killed Trooper Gross hit him in the back as he tried to escape from appellant. We find nothing in the nature and circumstances of this crime to be mitigating.

Appellant's history, character, and background provide some mitigating weight. Appellant grew up on a family farm, the oldest of two children. He was involved with 4-H and church activities. As a child, he often played alone and read frequently. One teacher questioned his attention span; however, subsequent tests revealed that he was very intelligent and had a long attention span. During high school, he worked at a grocery store. Following high school, he joined the Navy. However, he abused alcohol and drugs, was disciplined in three nonjudicial proceedings, and was ultimately let go from the Navy with a less than honorable discharge. Appellant later worked at the Kroger distribution warehouse. As an adult, appellant continually had problems with alcohol abuse. He attended Alcoholics Anonymous and Interact Behavioral Health Care, but could not stop drinking. There was also evidence that his father may have been abusive or hard on him as he was growing up, which is entitled to some weight. Additionally, appellant had told some witnesses that he had lost a wife or girlfriend in an automobile accident while stationed in Hawaii. However, the

state refuted this allegation. Even if true, it is entitled to little mitigating weight.

With respect to the statutory mitigating features, very few are present.

Under *R.C. 2929.04(B)(3)*, we are to take into account the factor of whether, at the time the offense was committed, the appellant suffered from a mental defect causing him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Appellant was said to have suffered from two types of psychiatric disorders: a dysthymic disorder, which is a persistent form of depression, and substance abuse. Appellant did not claim that these mental diseases or defects met the criteria of *R.C. 2929.04(B)(3)*. We give them only modest weight in mitigation under *R.C. 2929.04(B)(7)*. See *State v. Brooks (1986), 25 Ohio St. 3d 144, 155-156, 25 Ohio B. Rep. 190, 200, 495 N.E.2d 407, 417.*

As to *R.C. 2929.04(B)(5)*, appellant had a previous conviction for carrying a concealed weapon in 1995 and was placed on probation for that crime. Since there is not an absence of a criminal record, this factor does not weigh in appellant's favor.

Under the catchall provision of *R.C. 2929.04(B)(7)*, appellant's alcohol and drug abuse problems are entitled to some mitigating weight. See *State v. Green (1993), 66 Ohio St. 3d 141, 153, 609 N.E.2d 1253, 1263.* Appellant's intoxication at the time the murder was committed is also given slight weight in mitigation. However, appellant's predisposition toward disliking police as well as his actions prior to the murder reduce the weight ascribed to this factor. Appellant's remorse is also entitled to some weight under this subsection. However, there are no other relevant statutory mitigating factors to consider.

Based upon the foregoing, and upon weighing the aggravating circumstances against the mitigating factors, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Appellant's actions in committing a murder of a peace officer fulfilled the threats he had expressed to others that "something would happen" to the next officer who pulled him over. His actions merit the capital penalty to which he was sentenced. We conclude that the death penalty imposed in this case is both appropriate and proportionate when compared with capital cases involving the murder of a peace officer (*State v. Glenn [1986], 28 Ohio St. 3d 451, 28 Ohio B. Rep. 501, 504 N.E.2d 701)* and murder to escape detection, apprehension, trial, or punishment for another offense (*State v. Burke [1995], 73 Ohio St. 3d 399, 653 N.E.2d 242).*

Accordingly, the judgment of the trial court is affirmed.

Judgment affirmed in case No. 96-2029.

Dismissal of appeal affirmed in case No. 96-2509.

MOYER, C.J., DOUGLAS, RESNICK, PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

APPENDIX

"Proposition of Law No. I[:] A prospective juror must be removed for cause when she unequivocally states that she is unable to set aside her belief that the defendant is guilty. Failure to remove such a juror deprives a capital defendant of the rights to a fair trial, an impartial jury, a reliable sentencing determination and due process of law.

"Proposition of Law No. II[:] When prosecutors infest [sic] a capital trial with invective and use disturbing physical evidence in such a manner that it inflames the jury, a capital defendant is denied his substantive and procedural due

process rights to a fair trial as guaranteed by the Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, as well as Article I, § § 1, 2, 9, 10, 16 and 20 of the Ohio Constitution.

"Proposition of Law No. III[:] By refusing [to] properly instruct the jury on the defense of intoxication, the trial court denied appellant White the right to a fair trial and to due process of law. U.S. Const. Amend. VI and XIV, Ohio Const. Art. I, § § 1, 2, 9, 10, 16 and 20.

"Proposition of Law No. IV[:] When a trial court refuses to provide the jury correct, relevant information about parole availability and relies upon a capital defendant's future dangerousness as an aggravating factor, a capital defendant is denied the right to a fair trial, due process of law and a reliable sentencing determination. U.S. Const. Amend. VI, VIII, and XIV; Ohio Const. Art. I, § § 2, 5, 9, 10, 16 and 20.

"Proposition of Law No. V[:] When a trial court evaluates expert psychological testimony relevant to the mitigating factors in *Ohio Rev. Code Ann. Section 2929.04(B)* under a sanity/competency standard and rewrites the expert's report before submitting it to the jury, a capital defendant is denied the rights to a fair trial, a reliable sentencing determination and due process of law. U.S. Const. Amends. VI, VIII, and XIV; Ohio Const. Art. I, § § 2, 9, 10, 16 and 20.

"Proposition of Law No. VI[:] A capital defendant is denied his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution when gruesome and cumulative photographs are admitted into evidence when their prejudicial effect outweighs their probative value.

"Proposition of Law No. VII[:] When every potential juror in a capital trial has been exposed to pre-trial publicity and not adequately voir dired to reveal prejudice, it is error for the trial court to conduct and allow cursory voir dire examinations to uncover such prejudice. Fifth, Sixth and Fourteenth Amendments to United States Constitution and Article I, Section 5, 10 and 16 of the Ohio Constitution.

"Proposition of Law No. VIII[:] When the trial court allows a capital trial to be video taped pursuant to the Rules of Superintendence and fails to make the video part of the record, a sufficient review of the record pursuant to *Ohio Rev. Code Ann. § 2929.05* cannot be conducted. U.S. Const. Amend. XIV; Ohio Const. Art. I, § § 1, 2, 3, 5, 10 and 16.

"Proposition of Law No. IX[:] When defense counsel fail to object to obvious constitutional errors during trial and use trial strategies that are harmful to their client, a capital defendant is deprived of the right to the effective assistance of counsel that is guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, § § 9, 10, and 16 of the Ohio Constitution.

"Proposition of Law X[:] A trial court denies a capital defendant the right to a fair trial and to due process of law when it erroneously instructs the jury or fails to instruct the jury during the trial and penalty phases of a capital case.

"Proposition of Law XI[:] A capital defendant has a right to be present at all proceedings. U.S. Const. Amend. VI, VIII and XIV; Ohio Const. Art. I, § § 2, 5, 9, 10, 16 and 20.

"Proposition of Law No. XII[:] A capital appellant, challenging his death sentence as disproportionate to cases in which the same or similar crimes were committed, is denied due process and equal protection when the reviewing court limits the pool of cases for comparison to only those cases in which the death penalty was imposed and then failing to engage in any meaningful review.

"Proposition of Law No. XIII[:] A change in the Ohio Constitution, which provides less review to capital appellants (whose crimes were committed on or after January 1, 1995) violates the Fourteenth Amendment and fails to provide the meaningful appellate review mandated by the Eighth Amendment.

"Proposition of Law No. XIV[:] The trial court erred by sentencing Mr. White to death in violation of treaties to which the United States of America is a signatory in violation of the Supremacy Clause of the United States Constitution.

"Proposition of Law XV[:] The death penalty authorized by the Ohio Revised Code deprives capitally-charged defendants of their lives without due process of law, denies equal protection and imposes cruel and unusual punishment in violation of the Ohio and United States Constitutions."

APPENDIX E

Filed in Court of Appeals

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CLERK OF COURTS
ASHLAND CO. OHIO

IN THE COMMON PLEAS COURT OF ASHLAND COUNTY, OHIO

STATE OF OHIO,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	96-CRI-07366
	)	96-COA-01182
MAXWELL D. WHITE	)	Voir Dire
	)	
Defendant.	)	

APPEARANCES:

RAMONA FRANCESCONI-ROGERS
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BEFORE THE HONORABLE ROBERT E. HENDERSON
JUDGE

June 10, 1996

VOLUME I

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* * *

[833] MR. ROBERT WHITNEY: You would, Mr. Marker, follow — or listen to the Court's instructions concerning all three options available?

THE JUROR: Yeah.

MR. ROBERT WHITNEY: All right. I have nothing further.

MS. FRANCESCONI-ROGERS: Pass for cause.

THE COURT: All right. Mr. Whitney.

MR. ROBERT WHITNEY: Pass for cause, Judge.

THE COURT: You're excused, and you may go down to the second courtroom again. And have the bailiff, if you will send in the second juror.

This is Susanne Sheppard. And the attorneys are going to be conducting this phase of the voir dire examination generally referred to as the "death-penalty phase." Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Mrs. Sheppard, we are involved in this type of case in a two-step procedure. The first step involves a phase called the guilty-innocent phase, where the jury will be determining whether or not the State of Ohio has proved the Defendant guilty of the offenses charged.

Depending on what the jury does with that verdict, we may arrive at a second phase of this trial, and the second phase of the trial is what's called the [834] "penalty phase" of that trial.

Assuming for a moment that the jury gets to the penalty phase of the trial, they will be instructed at that point in time that they must consider — strike that. That they must weigh aggravating circumstances of the offense against any mitigating factors presented by the Defendant.

Aggravating circumstances being things that I think maybe in layman's terms weigh in favor of a death-penalty verdict with mitigating factors being things that weigh against the imposition of a death penalty.

And the law mandates that the jurors during the penalty phase weigh the aggravating circumstances against mitigating factors in reaching a conclusion about the verdict — or the sentencing portion of the trial.

The jurors under certain circumstances have a choice with regard to some of the sentences. But there is another circumstance where the jurors wouldn't have a choice. And that is if the jurors during the penalty phase found beyond a reasonable doubt that the aggravating circumstances of the crime outweighed beyond a reasonable doubt the mitigating factors, then they are obligated, they are mandated by law, to return a [835] recommendation of death to the Court.

Do you think based upon your views and your sentiments that you would be able to follow the Court's instructions with that regard or with regards to that?

THE JUROR: I have mixed emotions on that because I feel — I am for the death penalty.

MS. FRANCESCONI-ROGERS: Okay. And not suggesting that you can't have whatever feelings you have on the issue, but instead saying to you that the Judge will instruct based upon what the Ohio legislature decided should be factors and the appropriate circumstances for imposition of the death penalty.

And the law sets out certain circumstances where it may be an option for jurors to impose a death penalty or when you might instead have to go to recommendations such as life imprisonment with 20 years or eligibility for parole after 20 years and eligibility for parole after 30 years; would you be able to set your sentiments aside and follow what the Judge is going to [836] tell you is required by law?

THE JUROR: I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and to be honest, I don't think I would be fair to the Defendant.

MS. FRANCESCONI-ROGERS: Are you talking about now with regards to potential sentence?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: Is it then — are you telling us that if the Judge said only under certain circumstances could you recommend the death penalty that you wouldn't be able to follow that and you'd do instead what you wanted to do as opposed to what he told you the law says you could do?

THE JUROR: I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it's a strong enough doubt. I just want you to be aware of it.

MS. FRANCESCONI-ROGERS: Do you understand that there could be a point in time when you'd be asked to sign your name to a verdict form recommending the [837] death penalty?

THE JUROR: Do I understand that I would be signing something like that —

MS. FRANCESCONI-ROGERS: That you could be, that you could be.

THE JUROR: Yes, I do understand that.

MS. FRANCESCONI-ROGERS: And would you be able to do that?

THE JUROR: I think I could once I heard all the facts. I think I could.

MS. FRANCESCONI-ROGERS: Okay. And when you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?

THE JUROR: Yes. I guess I am trying to say I am in favor of it as long as it's proven that it should be given.

MS. FRANCESCONI-ROGERS: All right. And that would bring up one other thing that I would want to discuss with you. Quite often prosecutors hear that since it is a death penalty that a case needs to be proven beyond all doubt or beyond a shadow of the doubt.

The Court in this case will instruct you that the burden of proof in this case is the same as it is in all criminal cases — beyond a reasonable doubt.

[838] Are you able to follow that law and hold the State of Ohio to that standard beyond a reasonable doubt and not any higher standard just because it's a death-penalty case?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: I have nothing — nothing further, Judge.

THE COURT: Mr. Whitney, you may inquire.

MR. ROBERT WHITNEY: Thank you, Judge. Mrs. Sheppard, so you understand, this particular type of case is an unusual case in the sense it's the only one where the jury actually that I can think of right now gets a chance to decide what punishment, what the sentence is going to be. And it's actually — it's a two-phased or two-pronged proceeding.

And we don't have a chance to discuss with the jurors the penalty part, the penalty phase of it, you know; and wait till we get there and then talk about it. So we have to talk about it now.

What I'm asking is, you do not — or do you believe that because we're sitting here talking about death penalty that you believe the defense is conceding that the case should get to that point?

THE JUROR: I don't completely understand.

THE COURT: No, I think you need to rephrase that. [839] I have difficulty with that question too, Mr. Whitney.

MR. ROBERT WHITNEY: It's a two-pronged case, so to speak. We have the evidence phase, or the guilt-innocence phase, and then we have the penalty phase. We can't wait until we get back the guilt-innocence phase and talk about the penalty phase.

What I'm asking, Do you have an opinion or believe that because we're sitting here talking about penalty phase that we have conceded already and agreed that this is a case that should get to that penalty phase?

THE JUROR: Well, if you have, I don't believe you should have yet because it hasn't been presented.

MR. ROBERT WHITNEY: That's what I'm asking. Do you believe that because we're sitting here talking —

THE JUROR: No.

MR. ROBERT WHITNEY: You understand we have to talk about it now because there's not going to be any break in between where we can talk with you about it?

THE JUROR: Right.

MR. ROBERT WHITNEY: The prosecution has brought up the word I believe "recommendation." that if the State should prove everything beyond a reasonable [840] doubt, No. 1, the offense, and No. 2, the aggravating factors outweigh the mitigating factors, that the death penalty could be recommended.

Do you understand that it's really more than a recommendation that the jury would make to the Court about the death penalty; in other words, although the word "recommendation" is used, it's for all practical purposes final?

MS. FRANCESCONI-ROGERS: Objection. I don't think that's an accurate statement of law.

THE COURT: If the State of Ohio proves beyond a reasonable doubt that the defendant is guilty of aggravated murder, including the death specifications, we go to the penalty phase.

And if, again, the jury finds in that phase of this case that the aggravating circumstances outweigh the mitigating circumstances, then it's the Court's opinion of the law, as I have read it, that a jury is required to return a verdict for the death-penalty recommendation.

MS. FRANCESCONI-ROGERS: It's my understanding also, Judge, but I don't believe that that is a final recommendation, which is what Mr. Whitney said. My

reading of the law would indicate the Court still then has to reevaluate.

[841] THE COURT: Absolutely. I said that this morning in the general charge.

MS. FRANCESCONI-ROGERS: Well, that was my objection to Mr. Whitney's question.

THE COURT: All right. Now we have thoroughly confused the prospective juror, and I'm going to ask you to rephrase your question again, Mr. Whitney, taking into account what the Court has said, what the prosecution has said.

MR. ROBERT WHITNEY: Do you understand, Mrs. Sheppard, that this recommendation that has been brought up would be a heavy recommendation, a heavy decision on the part of a juror?

THE JUROR: Yes.

[843] MR. ROBERT WHITNEY: All right. Would you consider, Mrs. Sheppard, any mitigation factors, follow the law as given to you by the Court, and consider mitigation factors versus aggravating factors in deciding upon a sentence in this case?

THE JUROR: I don't know. I need it rephrased again.

MR. ROBERT WHITNEY: Okay. We have in the law what's referred to as "aggravating factors," "mitigating factors." The State of Ohio has to prove beyond a reasonable doubt the offense of aggravated murder, the [842] offense of the death-penalty specification, and that beyond a reasonable doubt the aggravating factors outweigh mitigating factors

that the defense would produce or submit for the jury's consideration.

Would you be willing to consider the mitigating factors versus the aggravating factors?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You indicated early on, Mrs. Sheppard, in this proceeding here that you felt that you could not be fair to the Defendant Max White with reference to the penalty part of this proceeding, if we get to the penalty part of this proceeding.

As you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?

THE JUROR: I think to a certain degree, yes.

MR. ROBERT WHITNEY: That you could not be fair?

THE JUROR: I could not.

MR. ROERT WHITNEY: In other words, as you sit here now, do you have an opinion as to what you feel the penalty should be in this particular case?

THE JUROR: Like I indicated earlier, if the facts prove that he is guilty, yes, I have a strong belief.

MR. ROBERT WHITNEY: All right. Without hearing any mitigation, without hearing any further evidence?

THE JUROR: I know that completely doesn't feel fair and I know — I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, but I still have a little bit of doubt. And I think for a person's life, there should not be any doubt whatsoever.

MR. ROBERT WHITNEY: You feel that you should not serve as a juror in this cause because of that?

THE JUROR: What? Yes.

MR. ROBERT WHITNEY: I think the defense will renew its challenge for cause at this point.

THE COURT: You may inquire further.

MS. FRANCESCONI-ROGERS: Thank you. Mrs. Sheppard, so you understand, I don't think anyone is suggesting that you're not entitled to an opinion on the subject. We all have opinions when we walk in the courtroom.

But the Court is going to tell you, assuming that we get past the guilt phase and the Defendant is found guilty, the court is going to tell you under what circumstances and after what type of analysis the death [844] penalty could be imposed.

And the Court is going to tell you that if you found the aggravating circumstances did outweigh the mitigating factors, that the jury must recommend the death penalty.

And on the flip side, the Court will instruct you that if that same jury finds that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating

factors, that the jury must then consider the two other options available to them.

If the Court were to give you the instructions about the procedure that you must follow during the penalty phase, could you listen to his instructions and follow them in reaching a conclusion about what the appropriate penalty might be?

THE JUROR: Like I have stated, I feel I could do this, but yet, again, I still have that little bit of doubt that I couldn't.

MS. FRANCESCONI-ROERS: But you're telling us you feel you could?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: And at this point you're telling us that you're willing to attempt to do that.

THE JUROR: Yes.

[845] MR. DESANTO: Mrs. Sheppard, what all this is really saying is will you obey the law? You've obeyed the law throughout your life, I take it, and this is another time when all of us have to obey the law regardless of what our personal feelings are what the law should or shouldn't be.

The prosecutor has to obey the law and present the evidence as the Court instructs, the defense attorney has to conduct himself according to the law and a juror has to conduct themselves according to the law.

And all that means is you need to obey the instructions to the best of your ability. And that's what we're

asking. Can you do that; will you do that; will you obey the law on this matter and follow the Court's instruction?

THE JUROR: When I walked in here today, it was — I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the real truth.

And if we come to the truth that I feel we're going to, and I hate to see one man's life taken, but in fair honesty, in him taking another life, I think that he should be punished for that, and I'd like to be a [846] part of that.

MR. DESANTO: Would you obey the law and the Court's instructions?

THE JUROR: Yes, I would.

THE COURT: Any further questions, Mr. Whitney, before I rule on your —

MR. ROBERT WHITNEY: Mrs. Sheppard, I never meant to imply that you were a disobedient person to the law. Never meant to imply that. I don't believe that. I think you're a law-abiding citizen. I don't doubt about that in my mind.

My question is, are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

THE JUROR: No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.

MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if [847] you were a juror?

THE JUROR: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

THE JUROR: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

THE JUROR: Yes.

MR. ROBERT WHITNEY: I don't have any further questions.

THE COURT: All right. The challenge for cause is overruled. Thank you, Mrs. Sheppard. You may go back to the second courtroom downstairs. Barbara Smith is the next.

* * *

ORIGINAL

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No. 06-128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, WARDEN,

PETITIONER,

-vs-

MAXWELL D. WHITE, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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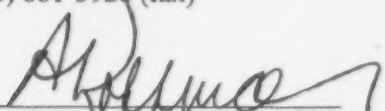

COUNSEL FOR PETITIONER

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

TABLE OF CONTENTS

Page

Parties to the Proceeding i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

A. The Petition Misrepresents the Factual Basis as to the Extent of The Jurors Comments Relating to Her Bias and Inability to Be Impartial. 1

B. Supplement Voir Dire Comments of Juror Sheppard 2

C. Sheppard's Articulated Comments During Death Qualification Revealed Her Bias and Inability to Be Impartial. 4

Reasons for Denying the Writ 8

A. The Sixth Circuit Decision Properly Cited AEDPA Standards and Properly Acknowledged the Special deference Due to Trial Court Findings. 8

B. Settled Precedent Dictate That Juror Bias Is a Question of Law and Therefore May Appropriately Be Resolved Pursuant to AEDPA's §2254(d)(1) Analysis 10

Conclusion. 20

TABLE OF AUTHORITIES

Cases Cited:	Page
Adams v. Texas, 448 U.S. 38 (1980)	11
Aldridge v. United States, 283 U.S. 308 (1931)	10
Bell v. Cone, 543 U.S. 447 (2005)	20
Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987)	13, 15
Harvey v. Tyler, 69 U.S. 328 (1864)	20
Kirk v. Raymark Indus., Inc., 61 F.3d 147 (3rd Cir. 1995)	13
LaVallee v. *Delle Rose*, 410 U.S. 690 (1973)	20
Martini v. Hendricks, 348 F.3d 360 (3rd Cir. 2003)	19
Miller-El v. Cockrell, 123 S.Ct. 1029 (2003)	10
Miller-El v. Dretke, 125 S.Ct. 2317 (2005)	10
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	20
Morgan v. Illinois, 504 U.S. 719 (1992)	14, 15, 16, 19
Murphy v. Florida, 421 U.S. 794 (1975)	14-15, 16
Parker v. Dugger, 498 U.S. 308 (1991)	20
Patton v. Yount, 467 U.S. 1025 (1984)	*passim*
Rice v. Collins, 126 S.Ct. 969 (2006)	17
Ring v. Arizona, 536 U.S. 584 (2002)	20
State v. White, 82 Ohio St.3d 6 (1988), 693 N.E.2d 772 (Ohio1998)	11, 12
State v. Williams, 679 N.E.2d 646 (Ohio 1997)	19
Wainwright v. Witt, 469 U.S. 412 (1985)	2, 10, 11
Walton v. Arizona, 497 U.S. 639 (1990)	20

Williams, v. Bagley, 380 F.3d 932 (6th Cir. 2004) 12, 18, 19

Statutes Cited:

§2254(d)(1) .... *passim*

§2254(d)(2) 10, 15

STATEMENT OF THE CASE

There is no reason for this Court to review this juror's voir dire answers. Juror Sheppard repeatedly and candidly acknowledged her biases and inability to be impartial toward Respondent White. There is nothing to support the alarmist and inaccurately grandiose contention that the Sixth Circuit's decision "rewrites AEDPA standards." (Pet. 2). The petition admits the Circuit Court properly "recited AEDPA's requirements" (Pet. 2), suggesting this case is simply about the Petitioner Warden not being happy with the Circuit Court providing sentencing phase relief for one the Petitioner is quick to label a "cop-killer." (Pet. 2)

A. The Petition Misrepresents the Factual Basis of the Juror's Comments Relating to Her Bias and Inability to Be Impartial.

In the Petitioner Warden's Statement of the Case only a few quotes from Juror Sheppard's voir dire are noted. These few quotes do not convey the full tenor of Juror Sheppard's comments openly admitting her bias and inability to be impartial. The Petitioner has excluded from the Appendix any and all of Juror Sheppard's general voir dire comments that preceded the death-qualifying. This omission fosters a misleading representation of Juror Sheppard's bias and impartiality. It is of no significance that prior to death qualifying defense counsel had withdrawn an initial challenge for cause during the general voir dire Apx. A-43. Defense counsel and Juror Sheppard both made specific reference to Sheppard's candid earlier responses in the course of her 'death qualifying' voir dire answers.

For example, having had time to reflect upon matters subsequent to her general voir dire, Juror Sheppard was asked whether she could set aside her personal sentiments and follow the law relating to the sentencing phase. Sheppard's answer reiterated and referenced her earlier comments: "I feel with what I have gone through today with the strong feelings I had when I went into the

courtroom in the beginning and being questioned could I be truly, truly fair about this, *I feel I still have those strong feelings*, and *to be honest, I don't think I would be fair to the Defendant*." (Apx. A-47) (emphasis added). This backsliding renders it appropriate to review those "strong feelings" when considering the juror's bias and ability to remain impartial during the death qualification.

And when defense counsel addressed the sentencing phase in voir dire, he too directed Sheppard's attention to what she had "indicated early on" in the general voir dire testimony where "you felt that you could not be fair." Counsel asked her whether, "[a]s you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?" Sheppard admitted, "I think to a certain degree, yes. . . . I could not." Apx. A-53. Counsel asked her specifically whether she had an opinion as to what the penalty should be in this particular case, to which Sheppard replied, " *[l]ike I indicated earlier*, if the facts prove that he is guilty, yes, I have a strong belief." Apx. A-53.

By omitting these general voir dire comments from both the analysis and the Appendix, the petition misrepresents the extent of Sheppard's bias and inability to be impartial. These omitted comments bear significance in that the petition's Introduction characterizes Sheppard's responses as having merely "voiced some hesitations" about her ability to be fair. (Pet. 3). That minimizes those comments to the point of being a mischaracterization.

It is the *totality* of Juror Sheppard's voir dire that is relevant to a proper determination of these issues. *Patton v. Yount*, 467 U.S.1025, 1036 (1984); *Wainwright v. Witt*, 469 U.S. 412, 430 (1985)). Therefore, Respondent White provides these additional facts of record that properly constitute the Statement of the Case.

B. Supplemental Voir Dire Comments of Juror Sheppard That Are Excluded from the Petition and the Appendix.

From the very first, Sheppard candidly admitted that she had formed an opinion about Respondent White's guilt based upon the "evidence" presented in the newspapers and on television. Apx. A-13.

As trial counsel sought to educate Sheppard about the dangers of relying upon media reports as evidence, Sheppard indicated that "[t]o be honest," she said, "when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there."Apx. A-13.

Trial counsel explained the difference between evidence and news media reports, to which Sheppard commented. "To a certain degree I agree on that [evidence vs. media], but with all the police officers and that that were involved in this, I really feel that he did do it. Apx. A-13 - A-14.

Trial counsel again explained that the trial would deal with more complex issues than simply whether Mr. White killed Trooper Gross. Sheppard indicated that, "I still feel -- I mean I will be willing to listen to everything, *but I still feel too strong about this*." Apx. A-14 - A-15.

Trial counsel asked Sheppard if the defense would have to present enough evidence to change her mind as opposed to the State having to come forth with sufficient evidence to prove its case, and queried whether "anything I say is not going to change your mind?" Sheppard stated, "I'm afraid not." Apx. A-15.

Trial counsel challenged her for cause but she was not removed. Apx. A-15.

In response to the state's effort to rehabilitate, Sheppard indicated that she felt the evidence to be introduced at trial would be exactly the same as the "evidence that I believe now." Apx. A-30. The Prosecutor did *not* ask whether Sheppard could be fair and impartial. Rather she asked Sheppard that if she "heard something differently [in the courtroom] and heard that something that she expected to be there isn't" could she decide the case on the evidence presented in the courtroom,

to which Sheppard replied that she could. Apx. A-30.

Defense counsel returned to questioning Sheppard and she again reiterated that "I still do have an opinion about this, and you will have to work hard to change that opinion." Apx. A-37. Sheppard explained that, ". . . I am a fair person. And I am willing to listen to all the evidence and then make my final decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there." Apx. A-37 - A-38.

C. Sheppard's Articulated Comments During Death Qualification Revealed Her Bias and Inability to Be Impartial.

As the case moved into the death-qualifying voir dire Sheppard indicated that she was for the death penalty. Apx. A-46. Having had time to reflect upon matters, when asked whether she could set aside her personal sentiments and follow the law, Sheppard informed that her earlier admissions of bias would yet impact her sentencing decision: "I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and *to be honest, I don't think I would be fair to the Defendant*." Apx. A-47 (emphasis added).

The Prosecutor then asked whether Sheppard would impose the death sentence only under the circumstances instructed by the Judge or whether "you'd do instead what you wanted to do?" Apx. A-47. Sheppard continued: "I feel by listening to everything, I think I could be fair, *but I can't sit here and say, yes, I will be fair.* I feel I can be after I hear all the facts, but *yet again I have doubt*. And I don't know if it's a strong enough doubt. I just want you to be aware of it." Apx. A-47 (emphasis added).

After further noting that she was in favor of the death penalty "as long as it's proven that it should be given," she again equivocated about her fairness. When trial counsel addressed the

sentencing phase, he recalled Sheppard's earlier general *voir dire* testimony where "you felt that you could not be fair," and asked her whether, "[a]s you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?" Sheppard admitted, "I think to a certain degree, yes. . . . *I could not.*" Apx. A-53.

Trial counsel asked concisely, "do you have an opinion as to what you feel the penalty should be in this particular case?" Sheppard responded: "Like I indicated earlier, if the facts prove he is guilty, *yes, I have a strong belief.*" Apx. A-53.

Trial counsel asked if this meant that she would vote for death "without any mitigation, without hearing any further evidence?" Sheppard's reply informed that even she thought that she should be removed:

> I know that completely doesn't feel fair and I know -- I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, *but I still have a little bit of doubt.* And I think for a person's life, there should not be any doubt whatsoever.

Apx. A-54.

Sheppard was then asked whether she felt that she should even be a juror:

> MR. ROBERT WHITNEY: You feel that you should *not* serve as a juror in this cause because of that?
>
> THE JUROR: What? Yes.

(Apx. A-54. Trial counsel renewed the challenge for cause. (Petitioner's App. 210a). The judge again allowed the Prosecutor to try to rehabilitate.

> [Prosecutor] FRANCESCONI-ROGERS:
>
> * * *
>
> If the Court were to give you the instructions about the procedure that you must follow during the penalty phase, could you listen to his instructions and follow them in reaching a conclusion about what the

appropriate penalty might be?

> THE JUROR: Like I have stated, I feel I could do this, but yet, again, *I still have that little bit of doubt that I couldn't.*
>
> MS. FRANCESCONI-ROGERS: But you're telling us you feel you could?
>
> THE JUROR: Mm-hmm.
>
> MS. FRANCESCONI-ROGERS: And at this point you're telling us that you're willing *to attempt* to do that.
>
> THE JUROR: Yes.

Apx. A-55. (emphasis added).

Prosecutor DeSanto summed up acknowledging Sheppard's repeated inability to overcome her bias. "And all that means is you need to obey the instructions *to the best of your ability.*" Apx. A-56 (emphasis added).

Juror Sheppard reiterated her belief that Mr. White *would* be found guilty and expressed her actual *desire* to be a part of his sentencing:

> THE JUROR: When I walked in here today, it was -- I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the truth.
>
> *And if we come to the truth that I feel we're going to*, and I hate to see one man's life taken, but in fair honesty, *in him taking another life, I think that he should be punished for that, and I'd like to be a part of that.*

Apx. A-56 - A-57 (emphasis added).

Presented in context it is clear what Sheppard's comment that she "would like to be a part of that" implied. However, in the petition this comment is referenced piecemeal and out of context and the Warden asserts that "that passage could just as easily be read to suggest something entirely different." (Pet. 23). This highlights the petition's weakness, which is that the analysis is not about

what the trial court or the Ohio Supreme Court found Sheppard to have said and meant, but rather how the Warden himself interprets what Sheppard "seems to be saying." (Pet. 23). Such arguments have no bearing on the Sixth Circuit's AEDPA analysis.

Following those comments Sheppard was asked a final bout of leading questions, not specifically directed to her ability to be fair and impartial. The Prosecutor's final, generic, leading question, was whether Sheppard would obey the law and the court's instructions, to which Sheppard simply replied, "Yes, I would." Apx. A-57.

Thereafter defense counsel asked two general leading questions eliciting one-word responses:

> MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror.
>
> THE JUROR: Right.
>
> MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?
>
> THE JUROR: Yes.

Apx. A-57 - A-58.

Finally, the petition omits the significant fact that the trial court engaged in no questioning of Sheppard, stated no reasons or rationale for denying the cause motion to disqualify, and expressed no factual findings whatsoever before it summarily denied the challenge for cause. Apx. A-58. This left the Sixth Circuit Court to divine from thin air exactly what factual predicate the trial court relied on to deny the challenge for cause motion.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Cited AEDPA Standards and Properly Acknowledged the Special deference Due to Trial Court Findings.

The Sixth Circuit's decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. In granting penalty phase relief, the Sixth Circuit properly addressed the biased juror analysis by the Ohio Supreme Court under §2254(d)(1), while acknowledging both the AEDPA's presumption of correctness standard and the "special deference" due to any trial court findings. Apx. A-5.

That strange claim that the Sixth Circuit 'rewrote' AEDPA law, (Pet. 2), is belied by the decision itself. The Sixth Circuit specifically set forth the proper AEDPA standards in Section II of the opinion. (Petitioner's App. 5a-6a). The Sixth Circuit clearly identified that "a writ may not be granted unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established' Supreme Court precedent or 'was based on an unreasonable determination of facts in light of the evidence presented' during the state court proceedings." (Petitioner's App. 5a). The Sixth Circuit specifically recognized that "the state court's factual findings are entitled to a presumption of correctness and may be disturbed only upon a petitioner's showing by clear and convincing evidence that the factual findings were incorrect." (Petitioner's App. 6a).

As will be discussed, the Sixth Circuit then applied those stated principles, identifying the proper legal standards and, on three separate occasions, specifically addressed the merits of the claim "in light of the special deference owed to a trial judge's determination of juror impartiality as well as the deferential standard for reviewing factual findings under §2254". (Petitioner's App. at 35a; Petitioner's App. 41a-42a ("Notwithstanding the deference owed to trial judges on issues of juror impartiality . . . ," and "Despite the deference usually owed to trial judges . . .")).

Even based solely upon Sheppard's death- qualifying comments, the petition acknowledges, as it must, that the Sixth Circuit clearly stated that it *was* applying the standard of legal deference properly brought to a voir dire analysis. (Pet. 10, noting that the Circuit Court concluded that

"[d]espite the deference usually owed to trial judges, we conclude that nothing about Sheppard's demeanor could cure the weighty concerns raised by her voir dire testimony."; Pet. 20, noting that "the [Sixth Circuit] court below spoke of providing deference . . . ").

Petitioner Warden's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The decision makes clear that the Circuit Court thoroughly reviewed the voir dire of Sheppard, evaluated the totality of her comments, the questions and comments of the attorneys, the complete lack of questions and comments by the trial court, and, applying the proper AEDPA standards, determined not only that Sheppard was in fact biased and unable to be fair and impartial, but that the trial court's determination to the contrary was unreasonable given the facts.

The Petitioner Warden chooses to ignore the Circuit's §2254(d)(1) analysis, thereby allowing the relief granted by the Circuit pursuant to clearly established law to remain essentially unchallenged before this Court. Rather, the petition argues incongruously that "federal courts may not grant the writ unless the state court's factual finding is an "unreasonable determination of facts in light of the evidence presented" during the state court proceedings," citing to §2254(d)(2). (Pet. 13). To the extent the petition is arguing, incorrectly, that deference precludes relief or that a juror bias issue may only be analyzed pursuant to §2254(d)(2), the Petitioner is wrong, and it is the Petitioner that would 'rewrite' AEDPA standards.

B. Settled Precedent Dictates That Juror Bias Is a Question of Law and Therefore May Appropriately Be Resolved Pursuant to AEDPA's §2254(d)(1) Analysis.

1. The constitutional question of bias is a question of established law and therefore properly subjected to § 2254(d)(1) review.

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude

> relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). *See also Miller-El v. Dretke*, 125 S.Ct. 2317, 2325 (2005). A trial court's "broad discretion" in the conduct of voir dire, although entitled to deference, is nevertheless "subject to essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

In *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), this Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's view's would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and his [or her] oath.'" (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). In *Witt*, the juror was properly struck because she repeatedly "affirmed that her beliefs would interfere with her sitting as a juror." 469 U.S. at 434. The *Witt* Court noted that this standard does *not* require that a juror's bias be proved with "unmistakable clarity." *Id.*, at 424.

In *Witt*, 469 U.S. at 430, the Court noted that the mere ruling denying a motion to excuse for 'cause' is the equivalent of the trial court making the finding of fact regarding a juror's bias. But the issue then becomes whether the finding is "fairly supported" by the "record . . . considered as a whole. . ." *Id.*, at 431. This pronouncement itself undermines the petition's arguments which, as noted in Respondent White's Statement of the Case, sought to excluded from this Court's review consideration of Juror Sheppard's general voir dire comments in which she repeatedly and candidly expressed both her bias towards Respondent White and her continued inability to remain impartial even after the voir dire moved into the death qualifying phase.

The refusal by the Warden to address the Sixth Circuit's §2254(d)(1) arguments improperly eliminates from habeas review the Ohio Supreme Court's conclusions, as enunciated in its direct appeal decision, *State v. White*, 82 Ohio St.3d 6 (1988), 693 N.E.2d 772 (Ohio1998), (Petitioner's App. 177a *et seq.*). These conclusions are legal determinations that applied Supreme Court precedent (incorrectly) and *are* properly subject to the §2245(d)(1) review applied by the Sixth Circuit. *Id.*, 467 U.S. at 1037, n. 12. Contrary to the petition's assertion, (Pet. 10), it is clear from *State v. White*, that the Ohio Supreme Court made no factual findings itself.

2. When faced with an allegation of bias, the question as a matter of law becomes not only 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence' but also, and ultimately, 'should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

This clearly established law has been acknowledged by the Circuit Court. *Williams, v. Bagley*, 380 F.3d 932, 944 (6th Cir. 2004).

The Petitioner Warden's refusal to address the Circuit's (d)(1) analysis head on results in a failure to discuss *Patton's* caveat that the constitutional question to be resolved is whether "the juror's protestations of impartiality [should] be believed." *Patton*, 467 U.S. at 1036. This glaring omission has the effect of reducing Sheppard's voir dire to mere gamesmanship in which the government's ultimate goal would be to lead a juror to the point of answering 'yes' to whether she could be fair and impartial. That would be the end of the discussion under the Warden's reasoning, and as a practical matter, this is the position asserted by the Warden.

It is a critical and fatal omission for the petition to never address the Circuit's analysis of the Ohio Supreme Court's decision as an unreasonable application of clearly established law, §2254(d)(1), given that state court concluded that, "[s]ince the challenged juror *ultimately* said that

she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause." (Petitioner's App. 183a - 184a). The Sixth Circuit began it own analysis with recognition of that "special deference" which was due the trial court's credibility assessment in the first instance. Yet, this is precisely what the Petitioner Warden repeatedly claims the Sixth Circuit *failed* to do. But pursuant to §2254(d)(1), the Sixth Circuit recognized, as the Warden never does, that the ultimate question on review of the state court decision remains whether the jurors protestation of impartiality should be believed. (Petitioner's App. 32a - 33a).

There is no 'rewriting' of the AEDPA here. Circuit courts have clearly and routinely applied the same reasoning as the Sixth Circuit noting that a trial court's refusal to excuse a juror will not be upheld "simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial despite earlier statements or circumstances to the contrary." *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3rd Cir. 1995); *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3d Cir. 1987) (though a juror swears that he could set aside any opinion he might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if other facts of record indicate to the contrary), aff'd, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990).

Rather the flaw in the Warden's entire petition is its bottom line argument that the deference due the trial court somehow precludes the granting of relief on this record.

3. The petition weakly shores up support for its argument by referencing Sheppard's ultimate one-sentence/ one-word responses to leading questions as part of her "unequivocal assertions" that she could follow the law and be fair and impartial. (Pet. 6, 11). It is noteworthy that the petition doesn't always make clear that several of Sheppard's cited answers are parsed and

unarticulated. (See *e.g.*, Pet. 21, noting that Sheppard "affirms" "that she will "obey the law and the [c]ourt's instructions" without noting that Sheppard had merely answers "Yes, I would" to the Prosecutor's leading question.) (Apx. A-57; Pet. 21, noting that Sheppard "affirms" "that she would "be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case," without noting that Sheppard had merely answered "Right" to the leading question by defense counsel.) Apx. A-57 - A-58.

The Supreme Court has not hesitated, particularly in capital cases, to find that even amidst the deference due to trial courts, certain exclusions for fairness must be made to effectuate constitutional protections. *See, e.g., Morgan v. Illinois*, 504 U.S. 719, 735 (1992). Thus, as a hedge against reducing juror bias questions to whether, as the Warden would have it, the juror ultimately can be coaxed into saying 'yes' or 'right' to a leading question about being fair and impartial, the Supreme Court in *Patton* provided guidance to lower courts in terms of how, in the context of giving the appropriate deference to the trial court, reviewing courts may *fairly* approach the factual analysis and the credibility assessments which often underlie a trial courts denial of a 'cause' challenge.

As *Patton* recognized, these guiding principles were necessary for cases just like Respondent White's, given that "[j]urors [] cannot be expected invariably to express themselves carefully or even consistently." 467 U.S. at 1039. As such, in the fair resolution of some inconsistency "[t]he trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." Similar reasoning is properly applied on review. In *Murphy v. Florida*, 421 U.S. 794, 801 (1975), the Court reasoned that "We cannot attach great significance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all."

Similarly in *Morgan*, 504 U.S. at 734-735, the Court cautioned that dogmatic inquiries and

leading questions about a juror's ability to be fair and follow the law are inadequate to remedy jurors' bias, "their protestations to the contrary notwithstanding." *Morgan* held that answers to "general questions of fairness or impartiality" cannot negate a specific statement by the prospective juror that he or she would not be impartial. *Id.*, at 745.

These guiding principles have been regularly followed by Circuit Courts. *Government of the Virgin Islands v. Dowling*, 814 F.2d 134, 139 (3rd Cir. 1987). Thus, even assuming Juror Sheppard's ultimate one-sentence or one-word responses *did* constitute such an "affirmative statement of impartiality," such perfunctory statements alone are not to be, as a matter of law, the determining factor. Rather, the trial court must still determine, from the context whether such a statement is believable. *Patton*, 467 U.S. at 1036. In Respondent White's case the trial court did no such thing.

Such clearly established guiding principles of fair assessment, have no sway in the Warden's analysis. While they would be equally applicable to a §2254(d)(2) analysis of any specific findings by Respondent White's trial court, (if it had made any), the Warden neither addresses nor even acknowledges them, even though they properly form the valid basis for the Sixth Circuit's (d)(1) reasoning.

For all the petition's focus upon deference, there is nothing in this record to indicate that the trial court made any determination or applied any reasoning to its factual 'finding' that simply overruled the challenge for 'cause' without explanation. By failing to apply the guiding principles of *Patton, Murphy* and *Morgan* the Warden's argument renders even its own application of §2254(d)(2) standardless, as *any* denial of 'cause' by a trial court based upon a juror's ultimate responses to one or two final leading questions would forever insulate the decision from federal review. Deference would itself deny relief.

Put another way, the Warden recites established law noting that "[t]he question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are *fairly* supported by the record," (Pet. 13), but never accepts that there are any guiding principles to assist the courts in assessing whether that record support is indeed *fair*.

Given that the trial court gave no reasons of any kind for overruling the challenge for cause, clearly established law requires that on review, the credibility of Juror Sheppard's responses in accordance with *Patton, Murphy* and *Morgan*, should be primarily weighted in favor of those answers that were 'most fully articulated,' rather than those mere responses to leading questions.

4. In granting sentencing phase relief, the Sixth Circuit's analysis followed the Supreme Court's guidelines exactly and considered Juror Sheppard's "cursory" answers to the leading questions against her more articulated answers. (*See* Petitioner's App. 40a - 41a (after detailed analysis of Sheppard's comments, and noting the specific comments that "make her claims of fairness and impartiality toward the defendant elsewhere in her voir dire suspect," stating:

> Although Sheppard stated subsequent to these comments that she could follow the law and not let her personal feelings interfere, her statements to this effect were far more cursory and, given the frequency with which her statements shifted back and forth on her ability to be fair, such subsequent statements are insufficient to alleviate the grave concern raised by her previous comments.

It is only after such a detailed analysis of the entire voir dire that the Sixth Circuit states that it is "[i]n light of these facts [that] we find that juror Sheppard was unable to "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court" (Petitioner's App. 41a)(citation to *Irvin* omitted) and concluded that "[n]otwithstanding the deference owed to trial judges on issues of juror impartiality, Sheppard's statements fell far short of the dictates laid out in Supreme Court case law regarding juror bias." (Petitioner's App. 41a - 42a).

Thus, the petition seriously misrepresents the Sixth Circuit's analysis when it decries "[i]nstead of searching for support in the record to affirm the trial court's determination, the Sixth Circuit focused on it *own* "grave" and "weighty" concerns about Sheppard's voir dire testimony." (Pet. .22). It did nothing of the kind. The Circuit Court's grave and weighty concerns were clearly the end result of having done a full and fair analysis guided by clearly established Supreme Court principles of review. The Warden doesn't like the result of the Court's analysis but the assertion that the Sixth Circuit somehow "abandoned settled understandings of "deference" in favor of some broader power to oversee juror-bias determinations," (Pet. 22), is simply not true.

5. The petition relies heavily upon *Rice v. Collins*, 126 S.Ct. 969 (2006), for the unchallenged assertion that credibility findings by a trial court, (in a *Batson* context), are entitled to clear-error-type deference. (Pet. 12-13). *Rice* noted that a federal court could grant the *habeas* petition if it was unreasonable for the trial court to credit the prosecutor's race-neutral explanations. The Petitioner Warden argues incorrectly that the situation in *Rice* is "nearly identical" to that of Respondent White, but fails to note that unlike Respondent White's trial court, which provided no explanations or reasonings whatsoever for its denial of the cause challenge, the *Rice* trial court gave a precise explanation and finding for its ruling. ("[H]owever, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The Court is prepared to give the District Attorney the benefit of the doubt as to Ms. 016").

The *Rice* Court's ruling overturned the Ninth Circuit's analysis because the panel majority had "substituted its evaluation of the record for [the evaluation] of the state trial court." *Rice*, 126 S.Ct. at 973. Respondent White's trial court gave no evaluation of anything, a fact that the petition ignores throughout.

6. The circuit case law upon which the Petitioner Warden bases his arguments is also inapposite to the issue. The petition repeatedly cites to *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), for the proposition that federal courts defer to trial court findings where a juror's responses lend support in both directions on bias issues. (Pet. 14, 15, 22). This case is distinguishable from Respondent White's case because, unlike the trial court in *White*, the Ohio Supreme Court specifically noted that the *Williams* trial court *did* question the jurors and engage in actual fact finding. *State v. Williams*, 679 N.E.2d 646, 654 (Ohio 1997) (noting that it was in response to the trial court's questioning that Juror Eddleman "indicated that she understood the balancing process for aggravating circumstances and mitigating factors and agreed that she could participate in that process, weigh the evidence fairly, and make the appropriate recommendation." *Id.* "Finding no abuse of discretion," the court concluded, "we therefore defer to the trial judge's discretion to determine whether Eddleman could indeed follow the law and be fair and impartial." *Id.* at 654-55).

Moreover, the Supreme Court in *Morgan* held that answers to "general questions of fairness or impartiality" cannot negate a statement by the prospective juror that he or she would automatically vote for death. *Morgan*, 504 U.S. at 735, 112 S.Ct. at 2233. In denying Williams' claim, the Ohio Supreme Court took specific reasoned note of the record assessing that the trial judge's questions were "more than general inquiries regarding a juror's ability to be fair and impartial. Instead, the judge fully explained the penalty stage, the law of mitigation and aggravation, and the corresponding penalties." *State v. Williams*, 679 N.E.2d at 655.

Similarly, in *Martini v. Hendricks*, 348 F.3d 360 (3rd Cir. 2003), a case upon which the Petitioner Warden draws extensive support, (Pet. *passim),* there is a distinguishing factual difference in the trial court proceedings, which significantly impacts the validity of the deference

given by the state's highest court to the trial court's factfinding. As White's Statement of Facts indicates, the vast majority of Juror Sheppard's articulated statements indicated her open bias and admitted inability to remain fair and impartial. As the Sixth Circuit noted upon review of her entire voir dire, it was only her minimal "cursory" responses to leading questions that formed the substance of Sheppard's 'fair and impartial' comments.

By contrast, the *Martini* decision affirms the deference to be given the trial court in an entirely different context, noting that the question confronting the court is "how to interpret the "think so's" and the "I guess so's," *which constitute the bulk of [Juror] Vladyka's affirmative responses*." *Martini*, 348 F.3d at 366-67. (emphasis added). The 'bulk' of Sheppard's clearly articulated answers did not require any such 'interpretation' by the Sixth Circuit. *Martini* is inapposite to the case before this Court.

III. Conclusion.

In providing sentencing phase relief, the Sixth Circuit Court applied clearly established Supreme Court law informed by clearly established guiding principles of review. The Sixth Circuit engaged in proper review of this issue, considered all interpretations of Sheppard's comments consistent with the context and totality of her other comments, and determined in a manner consistent with clearly established Supreme Court precedent that she was in fact biased. However, the Circuit Court did not end its analysis there. The Court, clearly cognizant of the AEDPA standards of review, specifically identified the proper standards, stated that those standards were being applied, and that the state court judgments were "contrary to or an unreasonable application of Supreme Court precedent." (Petitioner's App. 42a). It is axiomatic that when a court cites the law, claims to apply the law, analyzes the facts under the law, it is presumed that the court actually is following the law. "There is no principle of law better settled, than that act of a court of competent

jurisdiction shall be presumed to have been rightly." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). The Circuit Court specifically cited the AEDPA standards of review as generally applying to Mr. White's case and/or to the specific issue of juror bias eight separate times. (Petitioner's App. 2a, 5a, 6a, 32a, 35a, 41a, 42a).

For the above stated reasons, Mr. White requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinion. The Sixth Circuit's decision creates no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does it provide any other reason to warrant revisiting this well and clearly-established area of the law. Therefore, Petitioner Warden's petition should be denied.

Respectfully Submitted,

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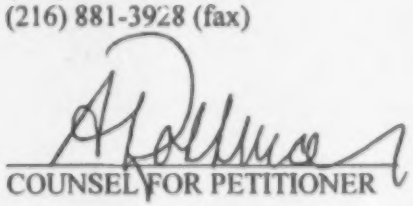

COUNSEL FOR PETITIONER

No. 06-128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, WARDEN,

PETITIONER,

-vs-

MAXWELL D. WHITE, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

CERTIFICATE OF SERVICE

I, Alan C. Rossman, a member of the Bar of this Court, hereby certify that on this 23rd day of August, 2006, a copy of the foregoing Brief in Opposition Petition for a Writ of Certiorari to the Sixth Circuit Court of Appeals, Motion for Leave to Proceed In Forma Pauperis, and Affidavit of Indigence were deposited in a United States Mail Box, First Class Postage Pre-Paid, pursuant to Rule 29.3 to Douglas Cole, State Solicitor, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215.

I hereby certify that all parties requiring to be served have been served.

ALAN C. ROSSMAN
Counsel of Record

No. 06-128

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APPENDIX

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FILED IN COURT OF APPEALS

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JOYCE KNIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

IN THE COMMON PLEAS COURT OF ASHLAND COUNTY, OHIO

STATE OF OHIO,	)	
Plaintiff,	)	
-vs-	)	96-CRI-07366
	)	96-COA-01182
MAXWELL D. WHITE,	)	Voir Dire
Defendant.	)	

APPEARANCES:

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INSCORE, RINEHARDT, WHITNEY & ENDERLE, by
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For the Defendant

BEFORE THE HONORABLE ROBERT E. HENDERSON
JUDGE

June 10, 1996

VOLUME I

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COPY

THE COURT: Service as a juror is one of the most important and valuable civic duties which you can perform. Trial by jury is one of the most valuable rights that all of us possess in this country. And the preservation of this right is strengthened by your willingness to respond to this call for jury service.

It is recognized that each of you may be making some sacrifice by being present today. On behalf of this Court and of this community, I commend you and I thank you for your public-spirited activity by being here today.

Ladies and gentlemen, as prospective jurors, you will be placed under oath or affirmation, and counsel and the Court will question you to determine your abilities to be fair and impartial in this particular case.

The questions that will be put to you are not designed to pry into your personal affairs but to discover if you have any knowledge of this case or any preconceived opinions which you cannot lay aside or if you've had any experience in your own personal or family lives that might cause you to favor one party or the other. These questions, then, are necessary to assure each party a fair jury.

I'm going to ask that all of you, including

3

the 12 in the jury box, rise at this time, raise your right hands, and the clerk of this Court will administer your oath before the voir dire examination.

THE CLERK: (So done.)

THE COURT: You may be seated, ladies and gentlemen. Now each party to this lawsuit is entitled to jurors who approach the case with open minds and agree to keep their minds open until a verdict is reached.

Jurors must be free as humanly possible from bias, prejudice or sympathy, and not influenced by preconceived ideas either as to the facts or the law.

You will be receiving the facts from the witnesses who testify from this witness stand, instructions as to the law will be given to you by the Court, and it is your sworn duty to accept and to apply the instructions that are given by the Court.

Now you have been summoned here this morning as prospective jurors to hear a criminal case. The case is styled the State of Ohio vs. Maxwell D. White, Jr., and it's been given the Case No. 96-CRI-07366.

The charges include aggravated murder with death-penalty specifications and a firearms specification, having weapons while under disability and abduction with a firearms specification.

This week 12 of you are going to be selected to hear this case. There will be three alternate jurors also selected.

The Court and counsel, as I've indicated, are going to be conducting a process that is known as a "voir dire" examination V-O-I-R D-I-R-E. Those of you who may be French know that comes from the old French and means simply to tell the truth.

You are expected, therefore, to answer the various questions put to you by the Court and by counsel truthfully.

Now the Court is going to have an opportunity to ask you a series of questions. The attorneys for the parties, likewise, will have an opportunity to ask you a series of questions.

Since this is a case that contains death-penalty specifications, we will sometime during the selection of the jury individually voir dire each one of you upon that particular issue.

Now you and I today are in the United States of America, and we have the right to a jury trial. When I say "we," each and everyone of us has the right to a jury trial. And our civic duty requires each of us as citizens to be available to perform our civic duty. And the civic duty that we are talking about this morning is

jury duty service.

Now our system, although not perfect, works. It's designed to protect you and each one of you should we, you or I or any of us be charged with a crime. And it's designed to protect our society so that we can maintain the freedoms that other peoples are at this moment fighting for throughout the entire world.

Your willingness, then, to serve helps maintain this system and but for which the system would not be long maintained.

And while there may be reasons and good reasons why you could not sit in this particular case, we'll be discussing those matters.

We'll ask you to consider in your own mind the importance of this matter to the persons involved, the importance of this matter to the community, the importance of this matter to you as citizens and ask you not, not to lightly request to be excused from this important civic duty.

Now in a criminal case the State of Ohio is the Plaintiff. And the person or the party -- and they're designated the person or the party to bring this action. All criminal matters in the state of Ohio are brought by and in the name of the State of Ohio.

The local representative of the State of Ohio

in each county is the prosecuting attorney. Now the prosecuting attorney in Ashland County is Mr. Robert P. DeSanto.

I'm going to ask him to stand and let you take a look at Mr. DeSanto and advise the Court whether any of you are related to Mr. DeSanto or socially acquainted with Mr. DeSanto.

I take it from your respective silence that none of you are either related to or socially acquainted with Mr. DeSanto.

Has Mr. DeSanto ever done any legal work for any of you as a private attorney? All right. Let's start in the first row here in the jury box. No. 5. Is it Mrs. Gast?

THE JUROR: Yes.

THE COURT: Can you tell us what Mr. DeSanto, what legal work he might have done for you?

THE JUROR: Handling a malpractice suit for us right now.

THE COURT: He's in the process now of representing you in a malpractice action?

THE JUROR: (Nods yes.)

THE COURT: Anything in that particular relationship that would cause you to have difficulty in being fair and impartial to the Defendant's case as well

as to the prosecution's case?

THE JUROR: I would hope that he was a good attorney. I find it hard to go against him being that he's working for me, and I hope he's a good attorney.

THE COURT: Do you feel that because he at the moment at least is representing you that you'd be more inclined to vote in his favor than you would in the Defendant's favor.

THE JUROR: (Nods yes.)

THE COURT: You're excused, Mrs. Gast. Thank you very much for coming. Let's substitute the next juror in line, please.

THE CLERK: Sheryl Kaufman.

THE COURT: Did we have other hands -- yes, ma'am. Your name?

THE JUROR: Sheila Chronister.

THE COURT: What was it Mr. DeSanto represented you in?

THE JUROR: He handled the adoption of our two children and also did our wills.

THE COURT: All right. Anything in that particular relationship that would cause you to give more weight or less weight to the cause that he represents here today?

THE JUROR: No, sir.

THE COURT: You can set that aside --
THE JUROR: Yes.
THE COURT: -- and listen to the evidence as it's presented in this courtroom and then render a fair and impartial verdict for both parties?
THE JUROR: Yes, sir.
THE COURT: Anyone else in the jury box? Going to the back of the room.
THE JUROR: He handled my divorce.
THE COURT: And your name?
THE JUROR: Lesa McConnell.
THE COURT: Anything in that particular relationship that would cause you to give more weight or less weight to the cause that he represents here today?
THE JUROR: No.
THE COURT: You can set that aside, listen carefully to all the evidence, and then render a fair and impartial verdict for both parties to this case?
THE JUROR: Yes.
THE COURT: Thank you. Anyone else? Your name, please?
THE JUROR: Dorothy Taylor.
THE COURT: All right.
THE JUROR: An injury due to an automobile accident he represented me.

23

THE COURT: And there's no way, obviously, of postponing those, correct?

THE JUROR: Well, at her age, I would rather not.

THE COURT: Ladies and gentlemen, I propose to excuse this prospective juror?

MR. ROBERT WHITNEY: Judge, I have no objection to Mrs. Johnson being excused. Thank you.

THE COURT: All right. Mrs. Rogers.

MS. FRANCESCONI-ROGERS: No objection.

THE COURT: Pardon?

MS. FRANCESCONI-ROGERS: No objection.

THE COURT: You're excused, Mrs. Johnson. Thank you for coming. Call the next juror in line for that seat.

THE CLERK: Your Honor, No. 17, 18, 19 were excused. We will go to Judith Cannon.

THE COURT: Any other hands up in the jury box?

THE JUROR: We do have a vacation coming up on the 28th of this month. It is a camping trip down southern Ohio for all my family. But I possibly could get out of that.

THE COURT: All right. For the time being, we're going to pass that matter.

have indicated also on your questionnaire that you have had a bad experience with a gun; is that correct?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: And is that still how you want your answer to read?

THE JUROR: Yes, I had a bad experience with a gun.

MS. FRANCESCONI-ROGERS: When did that incident occur?

THE JUROR: When I was 12.

MS. FRANCESCONI-ROGERS: Is there -- can you tell us a little bit about it in a general nature?

THE JUROR: I was left at home with my brother and sisters to watch over them. And I was in my mother and father's room. I got curious about her pistol that they had. And I accidently -- it went off.

MS. FRANCESCONI-ROGERS: Is there -- back up a little bit. There will be testimony in this case that there were weapons involved on January 18th and January 19th of 1996.

Is there anything about the fact that you've had that bad experience and that you're going to hear testimony with regard to guns and it will be the State's testimony that people were hurt and killed with guns that make you unable or make you feel as though your

ability to sit in this case is going to be substantially impaired or that you're going to be prevented from following the law because of your experience?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: You think you can set aside, then, what happened to you when you were 12 and evaluate this case just on the evidence as it comes from the stand, the exhibits and the stipulations?

THE JUROR: Yes. It was just an error on my part.

MS. FRANCESCONI-ROGERS: Thank you Mrs. Dennison, I also have a question with regards to the statement that you didn't know if you were qualified to judge anybody else. You've been here today, you've looked around and you've seen the other individuals that are here.

As you sit here today, is there any reason that you know of that would make anyone else here any better qualified than you are to evaluate the evidence in this case?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Do you think that you would be able to listen to the testimony and render a verdict -- and it could happen to be a guilty verdict. In this case, do you feel, knowing yourself and your

to totally ban the use, ownership, control of firearms?

THE COURT: You've got eight also behind you. May be down to seven now.

MR. ROBERT WHITNEY: Does that cause anyone a problem? Do you belong to any group or organization whose principle is to ban the use or possession of firearms?

Knowing that there will be testimony about firearms or use of firearms in this case, do any of you have any feeling towards firearms that would cause a problem, a hysteria to the extent that you couldn't be fair and impartial if you're selected to serve as a juror here today?

Mrs. Sheppard, you had indicated, in a response to a question by Mrs. Rogers, that you apparently watched or followed the O.J. Simpson -- I guess it's State vs. Simpson or California vs. Simpson, the O.J. Simpson, we'll call it, and apparently you did so for a period of time?

THE JUROR: Off and on.

MR. ROBERT WHITNEY: Off and on. And I think you said something to the effect that you came to some conclusion one way or the other and you didn't watch it anymore?

THE JUROR: Right.

MR. ROBERT WHITNEY: At this trial I can tell you is not going to go on as long as the O.J. Simpson trial, okay?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Are you going to be able to sit for a week, 10 days, two weeks, perhaps three weeks, and keep an open mind and listen to all the evidence that will come forth in this case and then base your verdicts upon the evidence that you hear here in the courtroom and the law that applies to that evidence that Judge Henderson will give to the jury at the conclusion of the evidentiary part of the case?

THE JUROR: To be honest, when I walked in here, I had my opinion formed. And my opinion is still very strong. And I really feel that I know the newspapers and the TV told so much, but I really feel that there's enough evidence right there.

MR. ROBERT WHITNEY: Okay. And you understand that what the TV and the newspaper and so forth say is not -- it could be, you know, somebody talking to this person and his interpretation after talking to that person and so forth, and it may be something other than what actually happened that was reported in the paper?

THE JUROR: To a certain degree I agree on that, but with all the police officers and that that

were involved in this, I really feel that he did do it.

MR. ROBERT WHITNEY: Okay. Let me ask it this way, Mrs. Sheppard. We have entered a plea of not guilty to the charges as set forth in the indictment. Okay. That is not to say that I or my son Rolf or both of us are here trying to tell you that Max White is not guilty of anything. Do you understand?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: We've entered not guilty pleas to charges in the indictment. That's not to say that he may be guilty of something other than what is set forth in the indictment as stated, a lesser included offense. Okay.

In other words, this is not a case where somebody is going to find a glove and Max is going to be asked to put a glove on, you know, like the O.J. trial. I guess that was some big thing in there. Nothing like that.

He's guilty of something in this. I'm not saying he's guilty of what he's charged with. I'm sure he's guilty of some offense that falls within the classification of a lesser included offense. Okay. That's still not going to --

THE JUROR: I still feel -- I mean I will be willing to listen to everything, but I still feel too

strong about this.

MR. ROBERT WHITNEY: Okay. In other words, you would require, as I said earlier, maybe me to put on the old harness and start plowing uphill right from the get-go, so to speak, and anything I say is not going to change your mind?

THE JUROR: I'm afraid not.

MR. ROBERT WHITNEY: Well, I appreciate your honesty and candor in telling me that you have such an opinion and nothing that I'm going to be able to do or my client is going to be able to do would change that from the starting point.

Judge, again, in order to conserve time, I would challenge Mrs. Sheppard for cause.

THE COURT: Any objection, Mrs. Rogers?

MS. FRANCESCONI-ROGERS: I'd like to make inquiry, Judge --

THE COURT: All right. You may.

MS. FRANCESCONI-ROGERS: -- before you rule. Thank you.

THE COURT: We'll hold off ruling until you've had an opportunity.

MS. FRANCESCONI-ROGERS: Thank you.

MR. ROBERT WHITNEY: Thank you, Mrs. Sheppard.

Are any of the other -- or are any of the

84

other prospective jurors that are seated here now that as you think and reflect -- I know you haven't heard any evidence in the case. I understand that.

But having heard what you have heard, having heard the indictment read to you, other questions or comments of other jurors, do any of you have a problem now starting this case as a fair and impartial and an unbiased juror?

You don't have to be ashamed of it if you do have such an opinion. As I stated earlier, we're humans. We form opinions. We form conclusions. Sometimes they can be changed and sometimes they can't. We all have our own biases and our own prejudices. We know that.

And, again, the only way we can find out about it -- we can't look into your minds. You have to say something if you have a position such as that. You don't have to be ashamed of it if you have a conviction such as that.

Any of you have any problems right now other than what Mrs. Sheppard has told me? Yes, ma'am.

THE JUROR: I'm not sure this is the appropriate time, but I don't want to not say what -- I don't think I have any problems with being fair at this level in terms of... But if when this section of the

trial is over, if there needs to be a second sitting, I would not totally be unbiased in terms of what the law states.

January 19th happens to be my daughter's birthday. So in terms of making decisions at that level, I can't see the -- I don't know how to phrase it.

MR. ROBERT WHITNEY: Well, we're going to go further into that, Mrs. Ross. We're not going to do it, as I understand it, at this stage. Am I correct, Judge?

THE COURT: That's correct.

MR. ROBERT WHITNEY: And I appreciate you're bringing that up at this time. And when we get to that next stage of voir dire examination of jurors and we'll take that up further. I appreciate your bringing it up. Anyone else?

Have any of you ever sat down or maybe not sat down, have any of you ever had the occasion to discuss this case with family, fellow workers, friends? Any reason at all that may have come up and you've had some discussion. Mrs. Chronister?

THE JUROR: Yes, sir.

MR. ROBERT WHITNEY: You have?

THE JUROR: Yes.

MR. ROBERT WHITNEY: I'm not going to ask you

who you discussed it with or what your discussion was. I'll merely ask as a result of those discussions, Mrs. Chronister, did you form an opinion or conclusion as to what the ultimate decision in this case should be?

THE JUROR: No, sir.

MR. ROBERT WHITNEY: Mrs. Robert R. Ross?

THE JUROR: Same with me.

MR. ROBERT WHITNEY: It comes out in the paper, you hear it on the radio, you see it -- see it and hear it on TV. It's something that people will discuss. But, again, as Mrs. Chronister and Mrs. Ross, you didn't form any ultimate decision as to -- or any decision as to what the ultimate conclusion in this case should be?

THE JUROR: No.

MR. ROLF WHITNEY: Anyone else? Yes, ma'am, Mrs. Howman.

THE JUROR: I've discussed it with family. They haven't swayed me as a juror.

MR. ROBERT WHITNEY: If you were selected to serve, Mrs. Howman, we'll say that there's evidence presented that takes five, six, eight, ten days, whatever, and you retire to the jury room to deliberate and somebody brings something up that maybe didn't come out in the evidence, would you tend to try to reflect

back on what you discussed in order to supply that missing information to the juror who asked that question, or could you put your discussion out of your mind, decide this case on what you hear and see here in the courtroom by way of evidence?

THE JUROR: I would decide the case on what I hear here in the courtroom.

MR. ROBERT WHITNEY: Okay, fine. Someone else had their hand up.

THE JUROR: I would -- almost anybody would say they made some comment on it when they read the case in the newspaper, and everybody would say you can see that the paper maybe would lean one way or the other.

But my understanding is what we heard before, that's the story. What we we're hearing now is what we're supposed to take into account; is that right?

MR. ROBERT WHITNEY: When the jury is seated, there will be 12 people, Mrs. Smith, who will decide what the evidence is. I don't decide what the evidence is.

I try to present evidence on behalf of my client. Mrs. Rogers will present evidence on behalf of the State of Ohio. But not what I say, not what Mrs. Rogers says. There will be 12 minds who will ultimately have to determine what the evidence is and

what the facts are, 12 separate conclusions.

THE JUROR: So really anything that I saw on the news or heard on the radio is irrelevant to what we're doing here?

MR. ROBERT WHITNEY: Yes, ma'am. Can you follow, if you were to accept that proposition that this case is to be decided here not by what the Mansfield News Journal says, not by what the Cleveland Plain Dealer or Ash -- I think it's Ashland Times Gazette or what the TV stations say or what the radio commentators. Twelve people will decide and make the ultimate decision in this case based on what they hear and see here, okay?

THE JUROR: All right.

MR. ROBERT WHITNEY: Any problem with that?

THE JUROR: No, I just wanted to make sure that I understood everything clearly.

MR. ROBERT WHITNEY: Thank you. Anyone else have a problem with any discussions you may have had? I'm sorry, yes, sir. Your name?

THE JUROR: Dan Jones.

MR. ROBERT WHITNEY: Mr. Jones.

THE JUROR: I've discussed it before --

MR. ROBERT WHITNEY: Okay.

THE JUROR: -- during work.

MR. ROBERT WHITNEY: All right. Anything in

those discussions that would cause a problem if you were selected to serve as a juror here? I say "today." It's going to be today and the days following. Anything that would cause you a problem as a result of having discussed that with fellow jurors or --

THE JUROR: I have not formed an opinion.

MR. ROBERT WHITNEY: Well, the opinion -- I'm not going to ask you which way you formed an opinion. But I'll ask it this way.

Again, I'll state the example I used. Am I going to have -- back in the old days we put the harness on the horse and plow. And nowadays you hook the tractor up.

But in any event, when I'm driving the tractor or when I'm putting the harness on the horse, am I on behalf of Max White going to have to start plowing uphill right away because of the opinion or conclusions that you have?

THE JUROR: Probably somewhat, yeah.

MR. ROBERT WHITNEY: Well, I appreciate your answer and I appreciate your honesty and candor. Do you understand we have to start with whatever you think of Mr. White?

I don't care what you think of me, because I'm not on trial. It's not my trial. It's Max White's day

90

in court; it's the State of Ohio's day in court. We have to, whether we like it or not, start as evenly, as level as we can.

If I'm going to have to start out trying to change your mind, and that's not what the law is, okay?

THE JUROR: All right.

MR. ROBERT WHITNEY: And anything I say or do before we start, I'm not going to get that opinion or that conclusion out of your mind?

THE JUROR: Probably not.

MR. ROBERT WHITNEY: Okay. I would, Judge, to save time -- I understand Mrs. Rogers will have time to talk -- I would challenge Mr. Jones at this time.

THE COURT: All right.

MR. ROBERT WHITNEY: Yes.

THE JUROR: I agree with what he said, everything he says. I have formed an opinion. You're going to have to work awful hard.

MR. ROBERT WHITNEY: I would have to work double hard to change anything?

THE JUROR: Right.

MR. ROBERT WHITNEY: All right. I appreciate you're telling me.

MS. FRANCESCONI-ROGERS: I'm sorry, Mr. Whitney. Could we have your name?

MR. ROBERT WHITNEY: Yes. Your name, please?

THE JUROR: Sandy Bates, 33.

MR. ROBERT WHITNEY: Thank you. Nothing I'm going to be able to change that?

THE JUROR: No, I don't think so.

MR. ROBERT WHITNEY: Again, Judge, we would challenge juror No. 33.

THE COURT: So noted. And we'll rule after Mrs. Rogers has an opportunity to examine.

MR. ROBERT WHITNEY: Thank you. Yes, ma'am. You held up your hand and kind of nodded your head. I was not paying attention. I could see it when I was talking to Mr. Jones.

THE JUROR: It's an opinion with someone I work with, as you say not to discuss who it was. I have a very definite opinion.

MR. ROBERT WHITNEY: And nothing I'm -- I could stand here all day and talk to you, but I'm not going to be able to change it?

THE JUROR: No.

MR. ROBERT WHITNEY: Your name, ma'am?

THE JUROR: Mariam Cunningham.

MR. ROBERT WHITNEY: I appreciate your honesty and your candor in telling me that.

Judge, again I would challenge -- I'm not mad

at you when I say "I challenge you for cause," you understand? We're all human beings and we all have our ideas and so forth. I appreciate your candor.

THE COURT: The challenge is noted.

MR. ROBERT WHITNEY: Anyone else have a problem because of any discussions you may have had with anyone talking about the case?

Mr. Higgins, let's assume just for a few minutes here you've been selected to serve as a juror in this case and you've heard all the evidence and the law as given to you by Judge Henderson and you've retired to the jury room to begin and are deliberating.

Let's assume further that you find that after deliberation you discover that what you feel to be a sound, reasonable, logical conclusion or opinion that you formed in your mind differs from 10 or 11 of the other of your other fellow jurors.

Would you tend to give up that opinion, that conclusion, just by the sake of numbers alone?

THE JUROR: No.

MR. ROBERT WHITNEY: I don't mean you should be bullheaded and not discuss the case with your fellow jurors. I'm not advocating that or telling you that. All I'm just asking numbers alone.

THE JUROR: No.

MR. ROBERT WHITNEY: Mrs. Nixon, how about you?

THE JUROR: No.

MR. ROBERT WHITNEY: Would you just give up because of numbers or maybe because it's getting dark outside or late out at night or you're getting hungry or tired?

THE JUROR: No, it's got to do with the rest of a person's life.

MR. ROBERT WHITNEY: Again, I'm not telling you to be bullheaded because you think one way and not to discuss it.

Mr. Frye, I know you don't know that much about the case. I know you know what the charges are here and you've heard talk here this morning about ideas, opinions and so forth.

Let's assume, Mr. Frye, that the tables are switched here and today we're here talking about the State vs. Charles Frye and you're seated over here at this table where Max White is with your attorney.

Would you be comfortable knowing what you know, feeling what you feel, your present state of mind, your emotions, would you feel comfortable having a person such as yourself in your present state sit as a juror and decide your fate in your case if the tables

were switched?

THE JUROR: I have a couple issues. One of them is my son-in-law is a deputy sheriff in Medina County. And I didn't understand what this case was about till I walked in this morning.

And my daughter, for the first time pregnant with twins, and I'm struggling with that issue.

And the other thing is that whatever I would feel in that situation, whatever my anger or frustrations or whatever is, however strongly I felt, I simply -- I'm simply opposed to capital punishments. But there may be other kinds of issues too.

MR. ROBERT WHITNEY: Well, that point we'll get to at a later state in voir dire. Go ahead.

THE JUROR: Your question was if I were the accused?

MR. ROBERT WHITNEY: Tables were switched and the person such as yourself, your state of mind, what your feelings are, so forth, would you be comfortable in having a person such as yourself sitting on your jury and decide your fate, your guilt, your innocence?

THE JUROR: Yes.

MR. ROBERT WHITNEY: How about Mrs. Sheppard? Well, you and I have already talked.

Mr. Marker, how about you? If the tables were

switched here today and it was State vs. Marker and you were charged with something or other -- it doesn't have to be what the charges are here today -- would you feel good about having a person such as yourself with your feelings, your emotions, your knowledge, your training, your experience being on your jury to decide your fate?

THE JUROR: Yeah.

MR. ROBERT WHITNEY: Thank you, sir. Mrs. Chronister, same question.

THE JUROR: I wouldn't be truthful now for three reasons. No. 1, my husband has MS, and he's on a special drug now. He has to have an injection every other day. He has some reactions to that. And my concern would be every other day how is he doing during the day?

No. 2, I'm a student in the evening. I go to class two nights a week. And in July I'll be going two nights a week plus three weekends. So my thoughts, you know, my homework, on tests, on that type of thing.

And No. 3, I'm sitting here knowing that my employer wants me back there. I cover -- I am the backup for four other people in my department. Two of those are on vacation today. One is off all week.

Also I do all the month-end closing and fiscal-year closing, which is at the end of this month

and first three weeks of July. And I would want somebody that would totally have their mind on the case.

MR. ROBERT WHITNEY: What you're saying is that you're going to be -- because of these and I understand because of these factors that you've explained, you're going to have a hard time concentrating on what's going on here?

THE JUROR: Total concentration, yes.

MR. ROBERT WHITNEY: Okay, fine.

THE COURT: Mrs. McConnell, how about you? Same question. Knowing what you know, having heard what you heard, you know better than I, your training, your education, what your emotions, your feelings are, if the tables were switched here today, would you want a person such as yourself sitting on your jury to decide your fate?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Thank you. Mrs. Baker, same question.

THE JUROR: Yes.

MR. ROBERT WHITNEY: Would you want somebody such as yourselves on your jury?

THE JUROR: I think so.

MR. ROBERT WHITNEY: Anyone else have a problem? Mrs. Bray?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You would want a person such as yourself --

THE JUROR: Yes.

MR. ROBERT WHITNEY: -- on your jury?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Thank you. Judge, with the exception of the challenges for cause and Mrs. Chronister's problem which was brought up, I'm "passing for cause," quote-unquote, at this point.

THE COURT: All right. You may inquire, Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Mrs. Sheppard, you had indicated, I believe, and I'm not going to be able to quote you exactly, I don't think, but based upon what you have read and the police officers involved and the evidence, that you reached a conclusion. I think that's basically what I've heard you say.

And you used the word "evidence." Do you understand, though, as you sit here today and after hearing what you've heard this morning, that you have not heard any of the evidence yet in this case?

THE JUROR: I understand that.

MS. FRANCESCONI-ROGERS: Do you understand that what the newspapers might have said happened may

not be the same thing that you're going to hear from the witness stand happened?

THE JUROR: Right.

MS. FRANCESCONI-ROGERS: Let's assume for a minute you heard from the witness stand something completely different than what you thought happened happened.

Would you be able to set aside that opinion that you have now and base your decision or your verdict on instead what you heard from the witness chairs -- the witness seat and the testimony presented in this trial?

THE JUROR: I feel I could, once I heard all the evidence, that as I feel strongly I'm going to hear the evidence that I believe in now.

MS. FRANCESCONI-ROGERS: Okay. But you're telling me if you heard something differently and heard that something you expected to be there isn't there, for example, that you would be able to set aside any opinions you might have now and decide this case only on the evidence as it's presented in this courtroom?

THE JUROR: I feel I could, yes.

MS. FRANCESCONI-ROGERS: In other words, what we're really saying is, anything that comes out of this courtroom has to take precedence and has to be much more

important that what you might have read or heard before this date in time.

Are you able to right now say to us that's the way I'm going to look at it; what comes before me here is what's important, not what I know up until this point in time? Can you tell us that?

THE JUROR: Yes, I can.

MS. FRANCESCONI-ROGERS: I'd address the same questions basically to Mr. Jones, Miss Bates and Miss Cunningham. I understand that at this point in time you've all read or heard certain things.

But assuming that when you hear testimony in this case that things aren't maybe what you heard them to be or read them to be, will you be able to reach a conclusion in this case and a verdict based on the evidence that comes forward in this courtroom as opposed to what you might now think is the case or what you might now believe to be the evidence?

Mr. Jones, I'll ask you first. Will you be able to set aside what you heard before and consider what you hear in this courtroom to be the important evidence? Because there is none other really.

THE JUROR: I'd like to be able to say yes, but I'm afraid I still have that thought in the back of my mind.

MS. FRANCESCONI-ROGERS: I'm going to ask you to assume the same things that I asked Mrs. Sheppard to assume. Assume something you read and believe to be the case is not the case.

Would you be able, then, to set that aside and say maybe that newspaper wasn't right or that radio station wasn't right and I need to determine this verdict on what the evidence is and what people tell me they saw and heard and know to have occurred in those early-morning hours of January 19th of 1996?

THE JUROR: I'm not sure. I'm not sure if I could or not.

MS. FRANCESCONI-ROGERS: All right. Would you consider -- and, again, we're just trying to get at what your position is at this point in time.

As you sit here today, are you able to assure us that the true evidence, the evidence you hear from the witness stand in the courtroom, will weigh much more heavily in your minds than anything you've heard or discussed at this point in time?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Ms. Bates, I'm going to turn to you and ask you the same type of things. It may come to be that what your preconceived idea right now is of the evidence may not be what you hear the

evidence is from the people who know the circumstances and the facts of the hours in question.

Would you be able -- let's say there was a difference between them -- to set anything that you've read and heard aside and base a verdict on what you hear come out of this courtroom in the next few weeks?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Would you be willing to assure the State of Ohio and the Defendant that it is in fact the evidence that comes from the stand that is important and not the facts as you've concluded them to be now based on what other portions of the media that you might have read or heard? Can you assure us you can do that?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Mrs. Cunningham, I'll turn to you. Again, knowing and not expecting anything different than people to be upset that there's a death and the death of a law enforcement officer, are you able to set aside what you read and what you know and what you've heard and say to us I'm going to make my decision -- and it may be the same one down the line. No one is asking you for that now.

But I'm going to make my decision not on what I preconceived up until today, but I'm going to make it

on what happens in this courtroom in the next week or two; can you tell us that you'd do that? I don't know the answer.

THE JUROR: Yes, I think so.

MS. FRANCESCONI-ROGERS: And if the Judge would instruct you, as I expect he would in the past, that you need to set aside all of those ideas or thoughts or things you've read because they are not evidence, are you able to set those aside and say to yourself or say to us I'm going to determine this case from what I find to be credible evidence during the course of this trial?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Judge, I would object to any of them being excused for cause.

THE COURT: Do you wish further examinations?

MR. ROBERT WHITNEY: Yes, Judge, if I could, please. Thank you.

THE COURT: You may.

MR. ROBERT WHITNEY: Mr. Jones, I think that when you and I were talking earlier, it was in response to a question -- you correct me if I am wrong, in response to a question I'd asked about if you've had occasion to discuss this case with people, not what the prosecutor was just now talking to you about, what you

read or what you heard.

My question related to discussions with people. And I believe you indicated you talked about this case at work and you had in fact formed an opinion as to what the ultimate decision in this case should be?

THE JUROR: Right.

MR. ROBERT WHITNEY: Remember when we talked about me putting on or hooking the harnesses on the horse and hooking up the tractor, going uphill; is there anything I say here that's going to change your mind? And your answer was no.

THE JUROR: You'd still be starting uphill.

MR. ROBERT WHITNEY: That's what I'm saying. You haven't changed your mind, have you? I'm still going or Rolf and I both for Maxwell are still going to have to start out plowing uphill, right?

THE JUROR: Right.

MR. ROBERT WHITNEY: And I believe, Mrs. Bates and Mrs. Cunningham, the same question to you. And I said to both of you, Can I do anything to change your mind? And you said no. And now the prosecutor has asked you and you said yeah. What's changed your minds?

THE JUROR: I do have an opinion. I have a very strong opinion, but I can listen to the evidence and base my opinion on that and throw everything out

that I've read and that I've talked about and I have talked about it.

MR. ROBERT WHITNEY: Well, if you've formed an opinion, then I'm going to have to do something to overcome that, right?

THE JUROR: Correct.

MR. ROBERT WHITNEY: We're not starting out on a level playing field, are we?

THE JUROR: Okay.

MR. ROBERT WHITNEY: I'm not making fun of you and I'm not trying to insult you, either. I appreciate what you're telling me.

But, you know, if I'm going to have to do something -- you see the burden is on the State of Ohio here. And maybe some people don't like that, but that's the law, that they have to prove everything. All the elements are truth beyond a reasonable doubt.

The Defendant doesn't have to do a thing. He doesn't have to get on the witness stand. He doesn't have to take, you know, testify. He doesn't have to call a witness. I wouldn't even have to stand up here and talk to you. We could just sit here and do nothing. And the burden is still the same, see?

THE JUROR: Yes.

MR. ROBERT WHITNEY: But I'm going to have to

overcome that with you?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: Mrs. Cunningham.

THE JUROR: I do have strong opinions.

MR. ROBERT WHITNEY: I'm going to have to overcome that with you, or the Defendant?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Again, I'm not poking fun at you. I'm not picking on you. I appreciate your candor and your honesty in your telling me what you feel.

Mrs. Sheppard, we had talked earlier, and I'd issued a challenge of cause not because I dislike you or don't like you or mad at you. I'm not. I think you'd indicated that you had an opinion in this case?

THE JUROR: Yes, I do.

MR. ROBERT WHITNEY: Do you still have it as you sit here right now?

THE JUROR: Like what was brought up, I haven't heard the evidence as far as someone sitting up there. Just from the media. And I still do have an opinion about this, and you will have to work hard to change that opinion.

But I am a fair person. And I am willing to listen to all the evidence and then make my final

decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there.

MR. ROBERT WHITNEY: Well, let me ask you a question this way, Mrs. Sheppard. I guess I started asking them to you earlier and I said no, I already talked to you. I won't.

Let's switch the tables now. And let's say it's State vs. Sheppard and you're over here. You're under the gun, so to speak, here today, not Max White, okay.

Now reversing the tables, I ask you as I asked other jurors earlier, knowing what you know and feel, your training, your experience, your emotions, your knowledge, your witnesses, would you want a person such as yourself sitting on your jury deciding your fate?

THE JUROR: Yes, I would, because I'm a very honest person.

MR. ROBERT WHITNEY: I believe you are.

THE JUROR: But I want justice to be seen just like anyone else does.

MR. ROBERT WHITNEY: That's why we are here. I know people, Oh, you're a lawyer. You don't care. All you care about is getting somebody out of this and so forth.

That's not the purpose. The purpose is to see

that they get a fair trial. As I indicated to you earlier, Max White is not going to walk out of this courtroom scot-free, not guilty of anything, I can tell you right now.

And I don't hesitate to tell you he's going to be found guilty of something. It may not be what he's absolutely charged with. It may be here or it may be here (indicating).

But he's entitled to a fair trial on those issues by people who have not formed an opinion or judgment as to what the ultimate decision should be, okay?

THE JUROR: Right.

MR. ROBERT WHITNEY: And you're telling me whatever your opinion is right now as you sit here, you can look me in the eye and tell me that you can put that aside and decide this case based on the evidence, not what your opinion is or what you feel right now?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You can do that?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: I think you can too. Okay. Withdraw our challenge for cause on Mrs. Sheppard, Judge.

Renew it on Mr. Jones, Miss Bates, Miss

Cunningham.

MS. FRANCESCONI-ROGERS: Judge, may I make inquiry one more time?

THE COURT: You may.

MS. FRANCESCONI-ROGERS: I'm just going to address you folks in the back now. I believe that you will be instructed by the Court that this Defendant, and I think Mr. Whitney has made mention of it, is presumed innocent as he sits today in this courtroom.

And that presumption remains with him until and unless the jury, after deliberations, reaches a different verdict. In other words, that they might find him guilty.

Now the Court would instruct you that whatever opinions you have today basically have to be thrown out, cast aside, and he must be afforded the presumption of innocence as he sits here today.

So I guess I need to ask you, Mr. Jones, can you afford him right now a presumption of innocence as he sits in the courtroom today if the Judge instructs you that that's what you are to do by law?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: All right. Mrs. Bates, same question to you?

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Mrs. Cunningham?

THE JUROR: That he's innocent?

MS. FRANCESCONI-ROGERS: Yes.

THE JUROR: No.

MS. FRANCESCONI-ROGERS: Would you afford him a presumption of innocence as he sits here today?

THE JUROR: Presumption of innocence?

MS. FRANCESCONI-ROGERS: Yes, meaning under the Constitution, a Defendant is presumed to be innocent as he begins any trial. And that cannot change until the end of the trial when deliberations are had and the jury might find differently and the Court will instruct that that is the law in Ohio.

Do you feel as you sit here today that you can cast aside prior opinions that you might have reached and say as I begin the trial today, I will presume him innocent and listen to the evidence as it comes off that stand?

THE JUROR: Not entirely, no.

MS. FRANCESCONI-ROGERS: All right. Judge, I will withdraw my objection to the for-cause dismissal of Mr. Jones, Mrs. Bates, Mrs. Cunningham, and renew my objection -- I'm sorry, I think Mr. Whitney has withdrawn his to Mrs. Sheppard.

THE COURT: All right. Mr. Jones, you're

excused. Mrs. Bates, you're excused. Mrs. Cunningham, you're excused.

We have reached the lunch hour at this point. And we're going to take the break for lunch at this time.

The Court is advising all of those of you who are still in the courtroom as prospective jurors, do not discuss this case among yourselves or permit anyone else to discuss it with you while you're gone from this courtroom, don't come to any conclusions with regards to any of the issues in the suit, as you're not entitled to do so until you have heard all of the evidence, the law that the Court will give you, and you are in the jury room, deliberating over this case.

The Court will stand in recess until 1:05 this afternoon.

(The time is 12:04 p.m.)

(A recess was taken.)

(Time is 1:14 p.m.)

THE COURT: Now, Mrs. Rogers, on behalf of the State of Ohio, do you have any further questions to ask members of this panel?

MS. FRANCESCONI-ROGERS: I do not, Judge. I would pass for cause on the limited portion of the questioning that we've done to this point.

THE COURT: All right. Mr. Whitney.

MR. ROBERT WHITNEY: Likewise, Judge, no further questions, and would pass for cause for the limited purposes at this point, Your Honor. Thank you.

THE COURT: All right. This particular panel of prospective jurors is to go to the second courtroom to remain there until we need them further, and those who are in the second courtroom are to be brought up for voir dire.

Before the remainder of this panel is brought up, I am instructing the photographers that this particular piece of equipment is to be turned off during the lunch hour and during the recess periods. And also it is to be turned off when there are sidebar conferences.

(Next 65 jurors were brought into the courtroom.)

THE COURT: With regard to the panel that have just been brought into the courtroom, you have been through the general voir diring or questioning of the members of this prospective jury this morning.

This afternoon, counsel for the State of Ohio and counsel for the Defendant will further question you. And I again advise you that the purpose in this questioning is not to pry into your personal affairs but

MR. ROBERT WHITNEY: You would, Mr. Marker, follow -- or listen to the Court's instructions concerning all three options available?

THE JUROR: Yeah.

MR. ROBERT WHITNEY: All right. I have nothing further.

MS. FRANCESCONI-ROGERS: Pass for cause.

THE COURT: All right. Mr. Whitney.

MR. ROBERT WHITNEY: Pass for cause, Judge.

THE COURT: You're excused, and you may go down to the second courtroom again. And have the bailiff, if you will, send in the second juror.

This is Susanne Sheppard. And the attorneys are going to be conducting this phase of the voir dire examination generally referred to as the "death-penalty phase." Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Mrs. Sheppard, we are involved in this type of case in a two-step procedure. The first step involves a phase called the guilty-innocent phase, where the jury will be determining whether or not the State of Ohio has proved the Defendant guilty of the offenses charged.

Depending on what the jury does with that verdict, we may arrive at a second phase of this trial, and the second phase of the trial is what's called the

"penalty phase" of that trial.

Assuming for a moment that the jury gets to the penalty phase of the trial, they will be instructed at that point in time that they must consider -- strike that. That they must weigh aggravating circumstances of the offense against any mitigating factors presented by the Defendant.

Aggravating circumstances being things that I think maybe in layman's terms weigh in favor of a death-penalty verdict with mitigating factors being things that weigh against the imposition of a death penalty.

And the law mandates that the jurors during the penalty phase weigh the aggravating circumstances against mitigating factors in reaching a conclusion about the verdict -- or the sentencing portion of the trial.

The jurors under certain circumstances have a choice with regard to some of the sentences. But there is another circumstance where the jurors wouldn't have a choice. And that is if the jurors during the penalty phase found beyond a reasonable doubt that the aggravating circumstances of the crime outweighed beyond a reasonable doubt the mitigating factors, then they are obligated, they are mandated by law, to return a

recommendation of death to the Court.

Do you think based upon your views and your sentiments that you would be able to follow the Court's instructions with that regard or with regards to that?

THE JUROR: I have mixed emotions on that because I feel -- I ~~am for the~~ death penalty.

MS. FRANCESCONI-ROGERS: Okay. And not suggesting that you can't have whatever feelings you have on the issue, but instead saying to you that the Judge will instruct based upon what the Ohio legislature decided should be factors and the appropriate circumstances for imposition of the death penalty.

And the law sets out certain circumstances where it may be an option for jurors to impose a death penalty, and part of the law reads that certain things must be proved and must be proved beyond a reasonable doubt before that option comes into play.

Are you able to set aside what you feel about the law or you feel should be the law and follow the Court's instructions about when you could impose the death penalty or when you might instead have to go to recommendations such as life imprisonment with 20 years or eligibility for parole after 20 years and eligibility for parole after 30 years; would you be able to set your sentiments aside and follow what the Judge is going to

tell you is required by law?

THE JUROR: I feel with what I have gone through today with the strong feelings I had when I went into the courtroom in the beginning and being questioned could I be truly, truly fair about this, I feel I still have those strong feelings, and to be honest, I don't think I would be fair to the Defendant.

MS. FRANCESCONI-ROGERS: Are you talking about now with regards to potential sentence?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: Is it then -- are you telling us that if the Judge said only under certain circumstances could you recommend the death penalty that you wouldn't be able to follow that and you'd do instead what you wanted to do as opposed to what he told you the law says you could do?

THE JUROR: I feel by listening to everything, I think I could be fair, but I can't sit here and say, yes, I will be fair. I feel I can be after I hear all the facts, but yet again I have doubt. And I don't know if it's a strong enough doubt. I just want you to be aware of it.

MS. FRANCESCONI-ROGERS: Do you understand that there could be a point in time when you'd be asked to sign your name to a verdict form recommending the

death penalty?

THE JUROR: Do I understand that I would be signing something like that --

MS. FRANCESCONI-ROGERS: That you could be, that you could be.

THE JUROR: Yes, I do understand that.

MS. FRANCESCONI-ROGERS: And would you be able to do that?

THE JUROR: I think I could once I heard all the facts. I think I could.

MS. FRANCESCONI-ROGERS: Okay. And when you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?

THE JUROR: Yes. I guess I am trying to say I am in favor of it as long as it's proven that it should be given.

MS. FRANCESCONI-ROGERS: All right. And that would bring up one other thing that I would want to discuss with you. Quite often prosecutors hear that since it is a death penalty that a case needs to be proven beyond all doubt or beyond a shadow of the doubt.

The Court in this case will instruct you that the burden of proof in this case is the same as it is in all criminal cases -- beyond a reasonable doubt.

Are you able to follow that law and hold the State of Ohio to that standard beyond a reasonable doubt and not any higher standard just because it's a death-penalty case?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: I have nothing -- nothing further, Judge.

THE COURT: Mr. Whitney, you may inquire.

MR. ROBERT WHITNEY: Thank you, Judge. Mrs. Sheppard, so you understand, this particular type of case is an unusual case in the sense it's the only one where the jury actually that I can think of right now gets a chance to decide what punishment, what the sentence is going to be. And it's actually -- it's a two-phased or two-pronged proceeding.

And we don't have a chance to discuss with the jurors the penalty part, the penalty phase of it, you know, and wait till we get there and then talk about it. So we have to talk about it now.

What I'm asking is, You do not -- or do you believe that because we're sitting here talking about death penalty that you believe the defense is conceding that the case should get to that point?

THE JUROR: I don't completely understand.

THE COURT: No, I think you need to rephrase

153

that. I have difficulty with that question too, Mr. Whitney.

MR. ROBERT WHITNEY: It's a two-pronged case, so to speak. We have the evidence phase, or the guilt-innocence phase, and then we have the penalty phase. We can't wait until we get back the guilt-innocence phase and talk about the penalty phase.

What I'm asking, Do you have an opinion or belief that because we're sitting here talking about penalty phase that we have conceded already and agreed that this is a case that should get to that penalty phase?

THE JUROR: Well, if you have, I don't believe you should have yet because it hasn't been presented.

MR. ROBERT WHITNEY: That's what I'm asking. Do you believe that because we're sitting here talking --

THE JUROR: No.

MR. ROBERT WHITNEY: You understand we have to talk about it now because there's not going to be any break in between where we can talk with you about it?

THE JUROR: Right.

MR. ROBERT WHITNEY: The prosecution has brought up the word I believe "recommendation," that if the State should prove everything beyond a reasonable

doubt, No. 1, the offense, and No. 2, the aggravating factors outweigh the mitigating factors, that the death penalty could be recommended.

Do you understand that it's really more than a recommendation that the jury would make to the Court about the death penalty; in other words, although the word "recommendation" is used, it's for all practical purposes final?

MS. FRANCESCONI-ROGERS: Objection. I don't think that's an accurate statement of law.

THE COURT: If the State of Ohio proves beyond a reasonable doubt that the Defendant is guilty of aggravated murder, including the death specifications, we go to the penalty phase.

And if, again, the jury finds in that phase of this case that the aggravating circumstances outweigh the mitigating circumstances, then it's the Court's opinion of the law, as I have read it, that a jury is required to return a verdict for the death-penalty recommendation.

MS. FRANCESCONI-ROGERS: It's my understanding also, Judge, but I don't believe that that is a final recommendation, which is what Mr. Whitney said. My reading of the law would indicate the Court still then has to reevaluate.

THE COURT: Absolutely. I said that this morning in the general charge.

MS. FRANCESCONI-ROGERS: Well, that was my objection to Mr. Whitney's question.

THE COURT: All right. Now we have thoroughly confused the prospective juror, and I'm going to ask you to rephrase your question again, Mr. Whitney, taking into account what the Court has said, what the prosecution has said.

MR. ROBERT WHITNEY: Do you understand, Mrs. Sheppard, that this recommendation that has been brought up would be a heavy recommendation, a heavy decision on the part of a juror?

THE JUROR: Yes.

MR. ROBERT WHITNEY: All right. Would you consider, Mrs. Sheppard, any mitigation factors, follow the law as given to you by the Court, and consider mitigation factors versus aggravating factors in deciding upon a sentence in this case?

THE JUROR: I don't know. I need it rephrased again.

MR. ROBERT WHITNEY: Okay. We have in the law what's referred to as "aggravating factors," "mitigating factors." The State of Ohio has to prove beyond a reasonable doubt the offense of aggravated murder, the

156

offense of the death-penalty specification, and that beyond a reasonable doubt the aggravating factors outweigh mitigating factors that the defense would produce or submit for the jury's consideration.

Would you be willing to consider the mitigating factors versus the aggravating factors?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You indicated early on, Mrs. Sheppard, in this proceeding here that you felt that you could not be fair to the Defendant Max White with reference to the penalty part of this proceeding, if we get to the penalty part of this proceeding.

As you sit here now, do you still possess that feeling that you could not be fair to the Defendant in the penalty part of this proceeding if we got to it?

THE JUROR: I think to a certain degree, yes.

MR. ROBERT WHITNEY: That you could not be fair?

THE JUROR: I could not.

MR. ROBERT WHITNEY: In other words, as you sit here now, do you have an opinion as to what you feel the penalty should be in this particular case?

THE JUROR: Like I indicated earlier, if the facts prove that he is guilty, yes, I have a strong belief.

MR. ROBERT WHITNEY: All right. Without hearing any mitigation, without hearing any further evidence?

THE JUROR: I know that completely doesn't feel fair and I know -- I can justify my feelings. I guess I had such strong feelings in the beginning and I want to be fair about it and I think I could go in and listen to all the facts, but I still have a little bit of doubt. And I think for a person's life, there should not be any doubt whatsoever.

MR. ROBERT WHITNEY: You feel that you should not serve as a juror in this cause because of that?

THE JUROR: What? Yes.

MR. ROBERT WHITNEY: I think the defense will renew its challenge for cause at this point.

THE COURT: You may inquire further.

MS. FRANCESCONI-ROGERS: Thank you.

Mrs. Sheppard, so you understand, I don't think anyone is suggesting that you're not entitled to an opinion on the subject. We all have opinions when we walk in the courtroom.

But the Court is going to tell you, assuming that we get past the guilt phase and the Defendant is found guilty, the Court is going to tell you under what circumstances and after what type of analysis the death

penalty could be imposed.

And the Court is going to tell you that if you found the aggravating circumstances did outweigh the mitigating factors, that the jury must recommend the death penalty.

And on the flip side, the Court will instruct you that if that same jury finds that the aggravating circumstances do not outweigh beyond a reasonable doubt the mitigating factors, that the jury must then consider the two other options available to them.

If the Court were to give you the instructions about the procedure that you must follow during the penalty phase, could you listen to his instructions and follow them in reaching a conclusion about what the appropriate penalty might be?

THE JUROR: Like I have stated, I feel I could do this, but yet, again, I still have that little bit of doubt that I couldn't.

MS. FRANCESCONI-ROGERS: But you're telling us you feel you could?

THE JUROR: Mm-hmm.

MS. FRANCESCONI-ROGERS: And at this point you're telling us that you're willing to attempt to do that.

THE JUROR: Yes.

MR. DESANTO: Mrs. Sheppard, what all this is really saying is will you obey the law? You've obeyed the law throughout your life, I take it, and this is another time when all of us have to obey the law regardless of what our personal feelings are what the law should or shouldn't be.

The prosecutor has to obey the law and present the evidence as the Court instructs, the defense attorney has to conduct himself according to the law and a juror has to conduct themselves according to the law.

And all that means is you need to obey the instructions to the best of your ability. And that's what we're asking. Can you do that; will you do that; will you obey the law on this matter and follow the Court's instruction?

THE JUROR: When I walked in here today, it was -- I thought it would be an easy out just to say I think he's guilty and that's it. But I feel being a part of the Ashland community that I have a duty that there's people out there that want people on that jury that's going to listen and find the real truth.

And if we come to the truth that I feel we're going to, and I hate to see one man's life taken, but in fair honesty, in him taking another life, I think that he should be punished for that, and I'd like to be a

part of that.

MR. DESANTO: Would you obey the law and the Court's instructions?

THE JUROR: Yes, I would.

THE COURT: Any further questions, Mr. Whitney, before I rule on your --

MR. ROBERT WHITNEY: Mrs. Sheppard, I never meant to imply that you were a disobedient person to the law. Never meant to imply that. I don't believe that. I think you're a law-abiding citizen. I don't doubt about that in my mind.

My question is, Are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

THE JUROR: No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.

MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if

you were a juror?

THE JUROR: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

THE JUROR: Yes.

MR. ROBERT WHITNEY: I don't have any further questions.

THE COURT: All right. The challenge for cause is overruled. Thank you, Mrs. Sheppard. You may go back to the second courtroom downstairs. Barbara Smith is the next.

Mrs. Smith, we're in what we call the death-penalty phase of this particular case. And counsel are going to inquire and question you about whether or not you're able to follow the law with regard to the penalty phase of this matter.

You may inquire, Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Thank you, Judge. Mrs. Smith, there are, as the Judge has indicated, two phases to this type of trial. There is a guilt-innocence phase and then, conceivably, under certain circumstances, there is also a penalty phase to this trial.

Whether or not there is a penalty phase

that to him also with regards to tomorrow's.

MS. FRANCESCONI-ROGERS: Judge, before the next juror comes in, I'd like to voice an objection for the record to any more questions or inquiry with regards to what 20 years and life with 20 and 30 means.

I don't think it has any relevancy to the inquiry that we're making, which is can they follow the law with regard to the death penalty.

And I think it's an attempt to educate or lighten the burden or discuss with them what may happen if and when he's institutionalized. So I'm objecting at this point to it being delved into any further.

THE COURT: Now we've done it once, each of you, Mr. Whitney, and I'm going to sustain the objection of the prosecution from after this point.

MS. FRANCESCONI-ROGERS: Thank you.

THE COURT: I want the second jury, gentlemen, the one that we brought up this afternoon, I want them back tomorrow morning at 8:30.

THE BAILIFF: Okay.

THE COURT: This group that we're now interviewing, questioning, I am telling them that they're not to return until they receive a call from the clerk of this court. It may be that they have to come back tomorrow afternoon.

innocent met that punishment.

I know that our law works very hard to ever prevent that, but that's one issue that bothers me.

MS. FRANCESCONI-ROGERS: Okay. Believing, as I think I just heard you say, that you do believe it is a wrong, do you think, then, that you would find it very difficult to vote for that death penalty even if you felt the State had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors?

THE JUROR: I'm thinking of what the Judge said before, that it isn't necessarily just an instruction to the other potential jurors, that it isn't just your belief but it's how the law is right now.

MS. FRANCESCONI-ROGERS: That's right.

THE JUROR: That because of the way the law is right now, I could follow, based on what you instructed me.

MS. FRANCESCONI-ROGERS: Part of what the law also indicates, though, is if a juror has a substantial impairment or difficulty in following that law, that that's something that this group of people needs to know right now.

So I'm going to go back to something Mr. Whitney talked about in his portion of the voir dire

that basically said if you were sitting on the penalty phase, you'd already decided his guilt beyond a reasonable doubt and you'd heard all the evidence on the penalty portion and you came back here, would I already have one foot in the hole that I would have to climb out of because your predisposition would be I don't want to impose that death penalty?

THE JUROR: I'm not a hundred percent sure.

MS. FRANCESCONI-ROGERS: Okay. And that's fair enough. I understand that they're tough questions.

Would you as you sat through the penalty-phase evidence be fighting having to impose that death penalty in your mind; in other words, looking for reasons not to have to impose it?

THE JUROR: Yes.

MR. ROBERT WHITNEY: Judge, I would object to "looking for a reason not to impose it." They're supposed to look for reasons to do it or not to do it. I don't think that's a fair question.

MS. FRANCESCONI-ROGERS: I'll rephrase it then.

THE COURT: It will have to be rephrased. Sustained.

MS. FRANCESCONI-ROGERS: After taking into consideration what the Judge would instruct you you

THE JUROR: Yeah, I'd say that.

MS. FRANCESCONI-ROGERS: Would it be fair to say that as you sit here right now, it would be your hope that you don't have to impose the death penalty?

THE JUROR: Correct.

MS. FRANCESCONI-ROGERS: Judge, I'm renewing it. And I would cite the Court to State vs. Phillips, 74 Ohio State 3rd 72, which indicates that the juror's death-penalty views are cause if they would substantially impair her ability to follow the law. And I'm renewing my motion that she be excused for cause.

THE COURT: Do you want to be heard, Mr. Whitney?

MR. ROBERT WHITNEY: Yes, Judge. I think the juror has indicated as per the questioning it would be difficult for her to do it. I think it would be most difficult for any human being to do it. But I think she's clearly stated in her answers to questions that she would follow the law, she would abide by the law.

Even though she wouldn't like to do it, she could impose the death penalty if in fact the State met its burden and proved its case beyond a reasonable doubt. She would follow the law and the evidence. And although finding it difficult, she would impose the death-penalty verdict.

THE COURT: Let me see your case that you're citing, Mrs. Rogers. Well, the unfortunate problem here is we've really had this both ways.

Now I'm going to go back one more time. If you believed that the State of Ohio had proven that the aggravated circumstances surrounding this crime outweighed the mitigating factors put on by the Defendant, would you be able to sign a verdict recommending to the Court the death penalty?

THE JUROR: Yes.

THE COURT: All right. The motion to excuse this prospective juror is overruled. We'll ask, Ms. McConnell, that you be back at one o'clock tomorrow afternoon into Courtroom 2 downstairs.

Sheila Chronister.

Miss Chronister, we're at that phase that's known as the "penalty phase" in this case.

And we get to that only by assuming that the jury that hears this case finds that the Defendant is guilty of aggravated murder with death specifications attached thereto. So you have to assume that.

If that were the case, then the same jury that heard the guilt-innocent phase of this case would determine the recommendation that is to be made to the Court with regard to the penalty in this case.

At that penalty-phase hearing, the Defendants -- the Defendant would have the opportunity to put on evidence with regard to mitigating factors. That means something that's limited, what has been done here. And the State of Ohio on the other hand would then be able to put on evidence with regards to aggravating circumstances.

In the event you were a member of the jury and the jury determined that the State of Ohio had proven to you by evidence beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors, then you would be required to make a recommendation to the Court that the death penalty be imposed.

So that's the question that counsel are going to inquire of you about in this phase. Mrs. Rogers.

MS. FRANCESCONI-ROGERS: Thank you, Judge. Mrs. Chronister, if you in fact did find, as the Judge just mentioned, that the aggravating circumstances outweighed beyond a reasonable doubt the mitigating factors presented by the Defendant, would you be able to recommend what you're required to recommend by law, which is the imposition of the death penalty?

THE JUROR: Yes, I would.

MS. FRANCESCONI-ROGERS: Accompanying that

obligation would be that if that jury recommended the imposition of the death penalty, it would also require that that jury sign their name in writing to a verdict form that would in fact make that recommendation to the Judge that he impose the death penalty.

Do you believe based upon how you feel and what you believe that you would be capable of signing your name to that death-penalty verdict?

THE JUROR: Yes, I feel that if I felt that he was guilty, then I would sign my name.

MS. FRANCESCONI-ROGERS: Okay. And understand that we would have moved out of the guilt-innocence phase, that would be done, and we would have then moved to the penalty phase.

And the legislature has determined that only if aggravating circumstances outweigh beyond a reasonable doubt mitigating factors may a jury recommend that.

The flip side of that is if you don't find that the State has proved that, then you couldn't recommend the death penalty and you would have to go to one of the life-sentence options.

Do you understand what I've explained?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: Would you be willing

to follow the Judge's instructions as to the law on those issues?

THE JUROR: Yes, I would.

MS. FRANCESCONI-ROGERS: Sometimes prosecutors hear that because there is a death penalty involved, the State ought to have to prove it beyond all doubt or beyond a shadow of a doubt.

And I will indicate to you that the Court will instruct you that that is not the State's burden. That the State's burden both in the guilt-innocence phase and the penalty phase is proving guilt beyond a reasonable doubt.

Are you willing to follow the Court's instructions and hold the State to the burden of proof beyond a reasonable doubt and not any other standard that you thought might have existed or that you might want to have exist?

THE JUROR: That's hard, because I would want to know beyond a doubt before I would be able to sentence someone to death. I would have a rough time, if there was any doubt at all.

MS. FRANCESCONI-ROGERS: Okay. I think the Judge would instruct you, though, that anything of human affairs is open to some kind of doubt.

THE JUROR: That's true.

MS. FRANCESCONI-ROGERS: And that the standard of proof for the State of Ohio is proof beyond a reasonable doubt. Not beyond all doubt or foreclosing any type of doubt, but beyond a reasonable doubt.

In other words, you would have already found guilty, him guilty, if we would have moved to the penalty phase.

And then the question would be, Do the aggravating circumstances outweigh those mitigating factors beyond a reasonable doubt?

If you didn't believe him guilty beyond a reasonable doubt, we wouldn't even get to Phase 2.

THE JUROR: That's true.

MS. FRANCESCONI-ROGERS: Are you willing to hold the State to proof beyond a reasonable doubt and not any other standard?

THE JUROR: Yes.

MS. FRANCESCONI-ROGERS: I pass for cause, Judge.

THE COURT: You may inquire, Mr. Whitney.

MR. ROBERT WHITNEY: Thank you, Judge. Mrs. Chronister, the words "proof beyond a reasonable doubt" and so forth, Mrs. Rogers has related to what Judge Henderson will instruct the jury, proof beyond a reasonable doubt, and I'm sure you were instructed this

way, is that type of proof that you would be willing to rely and act upon in the most important of your daily affairs, which is a fairly good standard to follow.

And it's not proof beyond all doubt or shadow of a doubt and so forth.

Assuming that we get to this penalty phase, and I know it seems strange that we're here talking right now about penalty and we haven't even decided guilt or innocence yet, but we have to do that because that's the way the state law says we have to do it. We can't stop after the innocent-guilt phase and then talk about penalty or punishment.

So we're not conceding the questions -- myself, Rolf, Max White are not conceding we could get to that penalty phase because we're sitting here talking about it. Do you understand --

THE JUROR: Right.

MR. ROBERT WHITNEY: -- we have to talk about it now. You responded one time in response to Mrs. Rogers's question if you felt he was guilty you could sign a verdict.

Now, in this particular case, there could possibly be two verdicts. If the State proved beyond a reasonable doubt Count No. 1, wherein Max is charged with aggravated murder, and they could also prove one of

the death-penalty specifications beyond a reasonable doubt and prove beyond a reasonable doubt -- or at that point we would have a verdict of guilty or innocent of aggravated murder.

If he's found guilty of aggravated murder and one of those specifications, then we go to the penalty phase.

The fact that you signed a verdict here in the guilty-innocence phase, would that automatically in your opinion make you sign a death-penalty verdict in the penalty phase, or would you be willing to listen to evidence in the penalty phase and weigh the mitigating circumstances against the aggravating circumstances?

THE JUROR: If I found him guilty, then I would have to do -- there would have to be a punishment. Now whether I'm saying it would be a death penalty at this point, I don't know.

MR. ROBERT WHITNEY: In other words -- go ahead.

THE JUROR: I guess it would apply to what he's found guilty, what charges.

MR. ROBERT WHITNEY: We only get to the penalty phase if he's found guilty of the aggravated murder.

If you find him guilty of the aggravated

murder, then we proceed to the penalty phase. And there could be three penalties. It could be a penalty of 20 years to life or 30 years to life. Or if the State proved beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating, it could be the death penalty.

My question, Are you willing to listen to all the evidence and follow the law as given to you by the Court before you make that decision as to penalty?

THE JUROR: Yes.

MR. ROBERT WHITNEY: It wouldn't just be because you signed a guilty verdict that you're going to say death penalty?

THE JUROR: No, sir.

MR. ROBERT WHITNEY: All right. Fine. Thank you, Mrs. Chronister. Pass for cause, Judge.

THE COURT: Anything further, Mrs. Rogers?

MS. FRANCESCONI-ROGERS: No, thank you.

THE COURT: All right. Mrs. Chronister, you're excused. We'd ask that you return to Courtroom No. 2 at one o'clock tomorrow. Thank you.

We're going to stand in adjournment.

(Time is 4:21 p.m.)

(3)

No. 06-128

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

MAXWELL D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

A. The Sixth Circuit's mere mention of the special deference standard does not overcome the court's failure to actually defer to the state court's juror-bias finding. 2

B. Federal habeas courts must treat state court juror-bias determinations as findings of fact, not law. 3

C. White's proposed requirements for deference to a state trial court's juror-bias decision find no basis in law 5

D. The record fairly supports the trial judge's finding that juror Sheppard was not biased 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Government of the Virgin Islands v. Dowling,
814 F.2d 134 (3d Cir 1987) 4

Kirk v. Raymark Indus., Inc.,
61 F.3d 147 (3d Cir. 1995) 4

Marshall v. Lonberger,
459 U.S. 422 (1983) 2, 6

Martini v. Hendricks,
348 F.3d 360 (3d Cir. 2003) 7

Miller v. Fenton,
474 U.S. 104 (1985) 4

Miller-El v. Cockrell,
537 U.S. 322 (2003) 4

Miller-El v. Cockrell (II),
545 U.S. 231 (2005) 7

Morgan v. Illinois,
504 U.S. 719 (1992) 5

Murphy v. Florida,
421 U.S. 794 (1975) 5, 6

Patton v. Yount,
467 U.S. 1025 (1984) 4, 5

Price v. Vincent,
538 U.S. 634 (2004) 2

Rice v. Collins,
126 S. Ct. 969 (2006) 2, 6, 7

Wainwright v. Witt,
469 U.S. 412 (1985) 1, 4, 6

Williams v. Bagley,
380 F.3d 932 (6th Cir. 2004) 7

Statutes

28 U.S.C. § 2254 ..... 2, 3, 4

INTRODUCTION

The Sixth Circuit noted, but failed to apply, the "special deference" owed to state court juror-bias decisions. Instead of asking whether the record fairly supported the trial court's decision, the court below re-assessed credibility on its own.

White responds that the Sixth Circuit's deference is shown by the court's recitation of the right rule. White Opp. Br. ("Opp.") at 7. But every aspect of the panel's analysis, save two passing references to "deference," reads like de novo review. Perhaps recognizing that the Sixth Circuit failed to *actually defer*, White tries to prop up the result below by claiming that the Sixth Circuit properly treated the juror-bias question as a legal one. Opp. at 9. But that argument shows the need for review, as it conflicts with the Court's treatment of juror-bias questions as factual, not legal.

White also implies that the trial judge's decision does not warrant deference because he failed to (1) question juror Sheppard personally; and (2) explain his decision to keep juror Sheppard on the jury. Opp. at 14-17. But White cites no case holding that deference applies only if a judge personally inquires. Indeed, the Court has held that a trial judge's denial of a request to excuse a juror for cause is itself a sufficient finding of fact that needs no further explanation. *Wainwright v. Witt*, 469 U.S. 412, 430-31 (1985).

White neither embraces nor applies the fair-support-in-the-record standard. Instead, he omits two of juror Sheppard's responses that support the trial judge's decision and accuses the Warden of failing to discuss the record as a whole by omitting juror Sheppard's general voir dire. Opp. at 1, 10. But White includes only some of Sheppard's general voir dire comments, which the Sixth Circuit did not purport to rely upon anyway. White neglects a crucial affirmation of juror Sheppard's impartiality and, more importantly, trial counsel's confident withdrawal of a challenge to juror Sheppard during the general voir dire. We therefore welcome

inclusion of the general voir dire, which only adds support for the trial judge's decision to believe juror Sheppard.

A. The Sixth Circuit's mere mention of the "special deference" standard does not overcome the court's failure to actually defer to the state court's juror-bias finding.

As our petition detailed, federal courts give "special deference" to state court juror-bias findings by upholding them when the record contains "fair support" for the finding. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). White did not, and could not, cite any part of the opinion below to show that the court looked for fair support. Instead, White insists that the Sixth Circuit met the standard by merely noting that state trial court juror-bias findings are entitled to special deference. Opp. at 7-8. But federal courts cannot insulate their decisions from review by paying lip-service to the AEDPA standards. *Rice v. Collins*, 126 S. Ct. 969, 973 (2006) ("Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court."); *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"). The lower court's *analysis* matters; its citation of the right test does not overcome its failure to follow that test.

White criticizes us for failing to discuss the Sixth Circuit's § 2254(d)(1) analysis, but the court's discussion of AEDPA deference is a vague afterthought: "Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent." App. 42a. The passage suggests the § 2254(d)(1) standard, but adds no analysis to rebut.

White's attempt to make up for the Sixth Circuit's deficiency is disingenuous. White partially quotes the Ohio Supreme Court's analysis, and he argues that the Ohio Supreme Court set the bar too low by requiring only a single affirmation of an ability to be impartial. Opp. at 11-12. He quotes the Ohio Supreme Court as concluding, "[s]ince the challenged juror *ultimately* said that she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause." White neglects to note that he supplied the emphasis to the word "ultimately" in that quote. See App. 183a. White also neglects to provide a full quote, which reveals more than a simple requirement that a juror "ultimately" say she will follow the law and not her beliefs:

> In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause.

App. 183a-184a.

B. Federal habeas courts must treat state court juror-bias determinations as findings of fact, not law.

White's own defense of the decision below undercuts his assertion that the court properly deferred. Specifically, White mistakenly characterizes the juror-bias issue as a

question of law. Opp. at 9 ("Juror Bias Is a Question of Law"). White quotes *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), in which the Court said that credibility determinations are assailable, and federal habeas courts can "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." But *Miller-El* confirms that juror-bias decisions are factual, as the Court specified two ways in which factual findings can be overturned: (1) the decision was "unreasonable"; or (2) the factual premise found by the trial judge is overcome with "clear and convincing evidence." *Id.* The Court noted in the same paragraph that "unreasonable" and "clear and convincing evidence" refer to the two AEDPA standards of the same language, which concern factual findings. *Id.*

White fails to respond to our showing that juror-bias decisions are purely factual. See Pet. at 12; citing *Patton v. Yount*, 467 U.S. 1025, 1036, 1038 (1984), and *Wainwright v. Witt*, 469 U.S. at 428. We add *Miller v. Fenton*, 474 U.S. 104, 115 (1985) ("juror bias merits treatment as a 'factual issue' within the meaning of §2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury").

White later muddles the standard even more by claiming that the decision below will not create confusion because "[c]ircuit courts have clearly and routinely applied the same reasoning as the Sixth Circuit." Opp. at 12. White then cites two Third Circuit cases as "proof" that the Sixth Circuit applied a familiar AEDPA standard regularly applied by other courts. But those cases are not AEDPA cases; they are not even habeas corpus cases. They are instead cases on direct review. See *Gov't of the Virgin Islands v. Dowling*, 814 F.2d 134, 139-41 (3d Cir. 1987), *aff'd*, 493 U.S. 342 (1990) (lack of mid-trial voir dire regarding jury's consideration of non-record information); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 155-56 (3d Cir. 1995) (civil case regarding juror's stated bias against asbestos companies).

C. White's proposed requirements for deference to a state court's juror-bias decision find no basis in law.

Instead of addressing our demonstration that the court should look for "fair" or "plausible" support for the trial court's decision, White invents several legal requirements for juror-bias decisions that serve only as artificial ways to distinguish some of the authority we cited in our Petition.

1. White discusses three cases from the Court for the proposition that trial courts should not believe statements of impartiality when they are brief and/or the product of leading questions. Opp. at 12-14. The Court did say that trial courts "may" consider such facts in sorting out contradictory statements: "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Patton*, 467 U.S. at 1039. But the Court imposed no mathematical weighing requirement. Indeed, the Court's analysis showed that even a single, slightly ambiguous statement could be the basis of an appropriate finding. *Id.* at 1039-40 ("we cannot fault the trial judge for crediting [a juror's] earliest testimony, in which she said that she could put her opinion aside '[if] [she] had to,' rather than the later testimony in which defense counsel persuaded her that logically she would need evidence to discard any opinion she might have.").

Nor do *Morgan v. Illinois*, 504 U.S. 719 (1992), and *Murphy v. Florida*, 421 U.S. 794 (1975), help White. Opp. at 13-14. Contrary to White's claim, *Morgan* said nothing about leading questions. Opp. at 13-14. The Court instead found that general questions about a juror's ability to be impartial are not enough to probe whether the juror would automatically vote for the death penalty. *Morgan*, 504 U.S. at 735. The voir dire here did not suffer from such a limited questioning, and juror Sheppard affirmed more than a general commitment to impartiality. She confirmed that she would require the State to prove that the death penalty should be

given, that she would not let her personal feelings override her duty to be a fair juror, and that she would consider all factors (including mitigating factors) before reaching a sentencing verdict. App. 205a, 212a-213a.

Murphy v. Florida, 421 U.S. at 801-02, a case regarding allegedly prejudicial pre-trial publicity, does contain a discussion about leading questions producing a statement of bias. But the Court emphasized that it was one loaded hypothetical scenario followed by leading questions that produced two weak statements ("I imagine" and "I think") that approached bias. Those two statements do not equal juror Sheppard's many affirmations that she would consider mitigating evidence and could be fair.

2. White insists that two other requirements are absent from the record, and he implies that their absence undermines the deference normally owed to trial court findings regarding juror bias. First, White criticizes the trial judge's failure to explain on the record why he allowed juror Sheppard to remain. Opp. at 7, 14-16. But the Court has expressly refused to require on-record explanations for juror-bias decisions:

> We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning. The finding is evident from the record.

Wainwright, 469 U.S. at 430-31; see also *Marshall*, 459 U.S. at 432-34 (no explanation required for credibility findings to be entitled to deference).

White nevertheless uses the lack of explanation here to distinguish *Rice*, 126 S. Ct. at 974, which did involve a trial judge's explanation for his credibility finding. But we relied

on *Rice* for the general point that federal habeas courts may not re-examine credibility when the record contains debatable inferences. Pet. at 23-24. More important, *Rice* involved a *Batson* claim, so a separate substantive rule requires the trial judge to assess the prosecutor's explanation by considering the evidence in support of it at a hearing. *Miller-El v. Cockrell (II)*, 545 U.S. 231, 251-52 (2005). No such requirement applies to juror-bias determinations.

Second, he argues that the trial judge here did not personally ask juror Sheppard any questions, and he claims that such a fact distinguishes this case from *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), one of five circuit court cases that we cited to show the need to defer to state trial court determinations fairly supported by the record. Opp. at 17. White cites no case for his conclusion that a judge's questions somehow enhance the juror-bias finding. And the *Williams* court did not rely on the judge's own questioning as the basis for deference. Thus, a lack of judge-questioning does not distinguish *Williams*.

White tries to distinguish another of our cited cases by contrasting the "think so's" and "I guess so's" that the Third Circuit evaluated in *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003). But White errs in equating juror Vladyka's equivocal *affirmative* responses with the entirety of juror Sheppard's answers. The relevant comparison is between the answers relied upon by the trial judge. In *Martini*, the judge excluded a juror whose stated ability to vote for a death sentence was expressed mostly with "think so's" and "guess so's." In contrast, juror Sheppard unambiguously expressed her ability to be impartial, to consider mitigation, and to follow the court's instructions.

D. The record fairly supports the trial judge's finding that juror Sheppard was not biased.

White mounts a scattered attack on the factual basis for the trial court's finding. He selectively quotes passages that

support his argument, omits juror Sheppard's responses that support the trial judge's decision, and accuses the Warden of failing to discuss the record as a whole by omitting juror Sheppard's general voir dire. Opp. at 1, 10.

1. White faults us for not including juror Sheppard's general voir dire. Opp. at 1, 10. But White does the same, as he includes only the favorable parts of the record. Moreover, we welcome the addition of juror Sheppard's *entire* general voir dire because it supports the trial judge's finding.

White purports to set out juror Sheppard's general voir dire, Opp. at 2-4, and finishes that recitation by including two partial quotes from juror Sheppard:

- "I still do have an opinion about this, and you will have to work hard to change that opinion." Opp. Apx. A-37;
- ". . . I am a fair person. And I am willing to listen to all the evidence and then make my final decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there." Opp. Apx. at A-38.

White omits the next two pages of dialogue between defense counsel and Sheppard. That dialogue included defense counsel asking juror Sheppard to consider a scenario in which she was the one on trial for aggravated murder: counsel asked whether she would want someone like herself on the jury. She replied, "Yes, I would, because I'm a very honest person." Opp. Apx. at A-38. After juror Sheppard later indicated that she would want justice done, defense counsel explained that everyone wanted justice, and he concluded his examination of Sheppard in this way:

> MR. ROBERT WHITNEY: . . . But he's entitled to a fair trial on those issues by people who have not formed an opinion or judgment as to what the ultimate decision should be, okay?
>
> THE JUROR: Right.

MR. ROBERT WHITNEY: And you're telling me whatever your opinion is right now as you sit here, you can look me in the eye and tell me that you can put that aside and decide this case based on evidence, not what your opinion is of what you feel right now?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You can do that?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: I think you can too. Okay. Withdraw out challenge for cause on Mrs. Sheppard, judge.

Opp. Apx. at A-39.

2. White's selective quotation of the death qualification voir dire is no fairer. White claims that only three responses by Sheppard show commitment to impartiality, and White contends that leading questions elicited responses of "Yes, I would," "Right," and "Yes." Opp. at 7. The transcript contains at least five strong statements disavowing bias, and the two that White omitted strongly show impartiality:

PROSECUTOR FRANCESCONI-ROGERS:

Okay. And when you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?

JUROR SHEPPARD: Yes. I guess I am trying to say *I am in favor it as long as it's proven that it should be given.*

App. at 205a (emphasis added).

PROSECUTOR DESANTO: Would you obey the law and the Court's instructions?

JUROR SHEPPARD: Yes, I would.

App. at 212a.

MR. ROBERT WHITNEY: My question is, Are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

JUROR SHEPPARD: *No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.*

MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror?

JUROR SHEPPARD: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

JUROR SHEPPARD: Yes.

App. at 212a-213a (emphasis added).

This fairly supports the trial court's finding. The Sixth Circuit's failure to even look for fair support led to its application of the wrong law and produced the wrong result.

CONCLUSION

For the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

Respectfully Submitted,

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